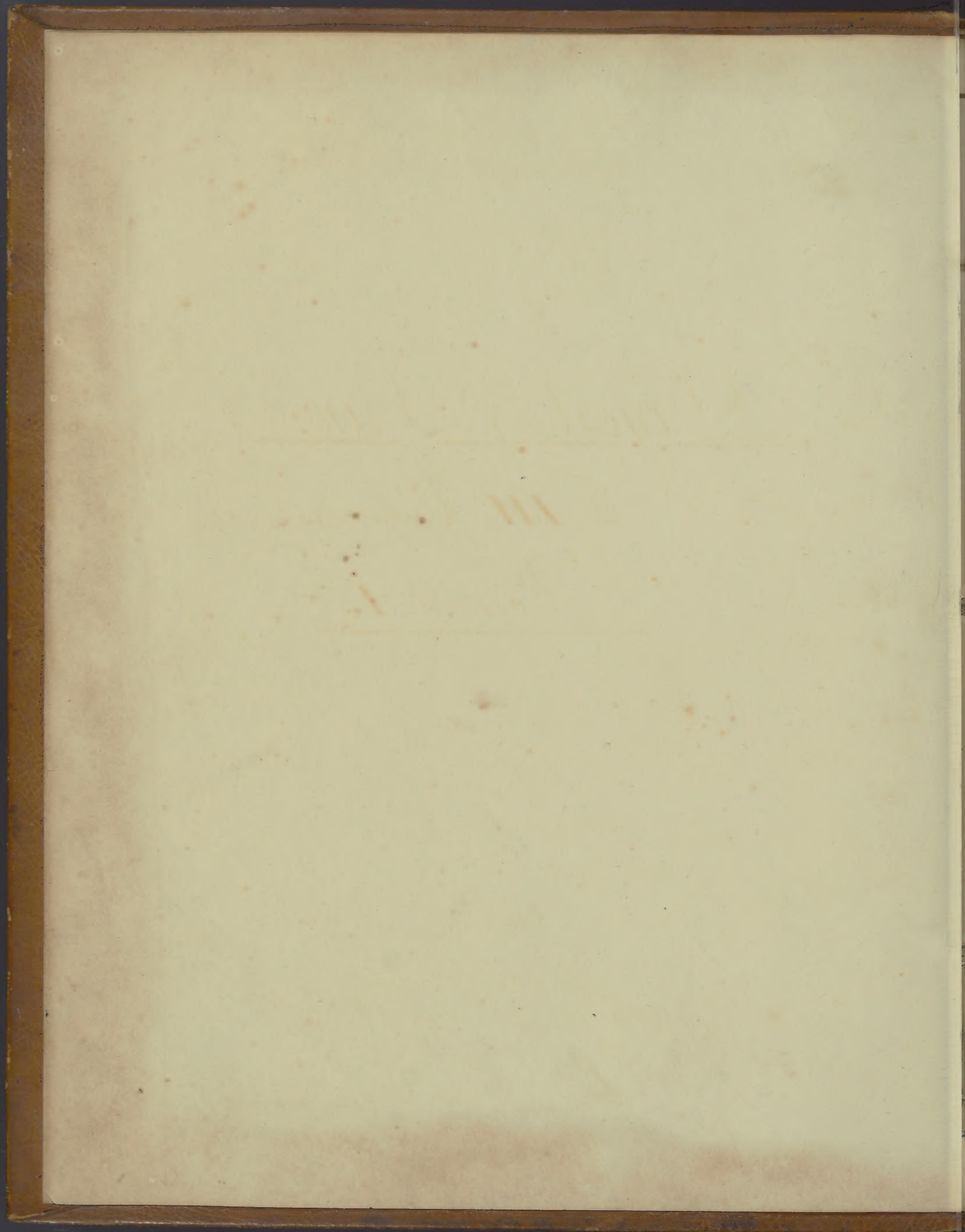


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Digest of Laws

In 111 Columns

Volume 1



A
Digest of Law:

In *III* Volumes..

Volume...I.

Original of

in the

Volume

A

Digest of Law.

In a series of Lectures, delivered at
Litchfield, Conn.

By Hon. Tapping Reeve & James Gould Esqrs.
And taken, stenographically,

By Josiah Houghton

In **III** Volumes.

Volume **I.**

Containing twelve chapters under the following titles.

Partnership,
Sheriffs & Goalers,
Statute of Limitations,
Covenant Broken,

Bailment,
Inns & Inn-Keepers,
Executors & Adm^{rs}.,
Evidence.

Digest of Laws.

A series of laws relating to the

of the

and

of the

III
Volume I.

Containing

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of the	of the
of the	of the
of the	of the

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Catalogue

Of the Officers & Students of the Law Institution

Sitchfield Conn.

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A Course of Legal Study prescribed by Hon. Jas. May Judge
of the U. S. of the U. S. & Hon. Daniel Webster. 1829.

Blackstone's Paley & Hume.

Law of Nations. Vattel & Martens.

Common Law. Black. omitting 2^d Vol. Robertson's Charles & the
1st Vol. Sullivan's Institutes & 2^d Vol. Black. Selwyn's Irish Laws.
Hoffman's legal course. Lawes on Reading.

Bacon's Art. & Cases Reading & Abatement. Chitty's Pleading.

Chitty on Bills. Cornyn on Contracts. Livermore on Ejectment.
Punnington on Ejectment.

Cruise omitting Adowson Letter Offices & Dignities Escheat
Private acts Kings Grant Fine & Recovery
and Alienation by custom.

Tolliver on Executors. Bacon (Title) Verdict Habeas Corpus.

Tender - Burns' Ecclesiastical Law title, Will.

Adams on Pleading. Abbot on Shipping & Insurances.

(Phillips Insurance is an excellent book for reference.)

Constitution of the U. States & Laws of Congress organizing
Departments. Reports Constitutional Law. Federalist.

State Constitution & Laws organizing Departments with
principal Statutes regulating & local distributions & Probate.

Equity Cooper's Pleading. Four Language - Makes Chancery
Practice with occasional reference to Equity Draftsmen.

Johnson's Chancery Cases.

Admiralty. Brown's civil & Admiralty Law. Hall's Practice.

Wheaton's Captures. Chitty on National Law.

Gilbert & Phillips on Evidence.

Saunders' Reports by Williams.

Sept. 1. 1829.

I. Partnership.

By J. Gould, Esq.

I. As to what amounts to a Partnership see
Doug. 356-71 4 Esp 102-2 P.W. 402-1 Bbl. 37-4 Aust 144-
Hale 37-2 Bbl. 247. 2 Bl. R. 930. vid post 3.

He who agrees to share in the profits of the business
makes himself liable to 3rd persons for the losses. Mat.
son 270.

Partners are possessed of Partnership property
per mi et per tout. 1 Bl. 39- Mat. 17-20-1- For the difference
between a Partnership & a sub. contract. 1 Bbl. 37. vid post 4. 2 Bl. 181.

The property of a deceased partner vests in his ex-
ecutors, but the surviving Partner has the right of suing
& collect such of the joint property as is not in possⁿ.
Mat. 49- Esp 110- Salk 444.

The survivor & the Ex^r of the deceased part-
ner cannot join. Ab. acc^t. & 1 B. & P. 445. He has the right
however under the liability to account with the Ex^r.
of the deceased partner. Mat. 49- Esp 340. vide post. 2. 8. 9
157.9

A surviving Partner may join in a dec^r. 1 Cam. b.
a demand accruing to him as survivor & a demand due- 327.
ing to him in his individual capacity. 3 Bbl. 433-5.
If the surviving Partner is unable to respond the de-
mand ag^t the Firm, the Ex^r is liable. 2 Bui. 459. And
in this case it has been customary to file a Bill in Chan-
cey ag^t the Ex^r. Ark. 147. Judge Mease thinks there is no
necessity of resorting to Equity. 1 P.W. 682.

This opinion has been formerly the orthodox one, pressed to the Bar by the Supreme Court in *Tracyfield Co.* 6 L. J. 21. - The surviving partner is cons.^d as sole situation
 Chit. P. 37. ag^t him a demand may be included tho' contracted since death of partner. 6 L. J. 582.

It has been said, that a surviving Partner has the absolute control of the joint property. 1 Ves. 242-52 - Math. 43. 144 - This idea Judge Stowell considers now inaccurate for an absolute control of property seems to amount to a complete ownership. Math. 40-6-294 5 - Coop. 449.

The true rule seems to be as settled in our courts that the property vests in the ^{surv}ivor, but reason of the inconvenience of joining the survivor & dec^d in one action (with this case one would sue in his own right, & the other in that of the testator - the one would be liable to costs sur-vests, & the other would not) the former is vested with the right to collect so much of the joint property as is in action. Stark. 414 - Womb. 474, vid post. 9. 167. 9

If A & B. transact business, even in separate names under an agreement to share in each others profit, each is liable so far as relates to the right of 3rd persons for the other unless there is an express agreement between them to the contrary. Doug. 371. 2 - 1 Ark. 747. Coak. 81 - Math. 27-73. But this law Merchant's doubt extend to speculations in lands. 11. Mo. 36. 424.

If one of two Partners obtain an act of Insolvency exempting his person from arrest, his estate, & the estate of the other Partner are still liable for the company debts. Ark. 6. 53.

Partners are Joint-Tenants, not only of the original stock, but of all the property acquired, whatever charges may take place in the course of Trade. Pre. Ch. 235 - Math. 17. 116-32 - 1 Ark. 242 - Coak. 444 - 1514.

Partnership is formed by contract; it is not suff. to constitute, actual Partnership; that two or more persons, holding any thing in common as legatees, purchased one of the same thing. Wats. 19-100. 25-55. 14. Co. Litt. 2. 116. 100^a 5^a

Partnership is a voluntary contract between two or more for joining together their money goods or labor, on an agreement, that the Gain or Loss shall be divided between them proportionally. Wats. 19. Day. 356-371- 3 P. 11. 402- 10 Bl. 27-

The Gain or Loss is to be borne in proportion to the share in which the respective partners contribute. Wats. 21-

If one advance money to a trader, he may make himself a secret partner. The criterion is that; if the profit or premium does rec. from the money advanced, he certain & definite, it is a loan; if casual, or indefinite & depending on the circumstances of Trade, he is deemed a Partner. Wats. 27-31-44-5- 2 Bl. 11. 990-47. 1 Com. 6. 293.

II. Secretary Partnership agreements are specifically decreed, in Chancery. Wats. 27-31-44-5- 2 Bl. 11. 990-47- 2 Vesey 23. Partnership concerns are regulated by the Large Merchant. Wats. 40-58. Palm. 399.

If no express agreement is made to the contrary, the gain & loss are to be shared equally alike, &c. &c. if there is. And if they make an express agreement, as to the profit only, their share in the loss shall be the same as stipulated for the profit & converso. Watson 34.

A person may make himself liable as a partner without entering into a contract of Co-partnership, by permitting another to use his name & credit, as such. Wats. 46-51-9-195- Day 630- Doug. 793.-

To subject persons on the ground of their sharing profits & loss, they must be jointly interested not only in the purchase, but in the future sale of the property. If then, A & B & C. agree, that A shall purchase a Cargo in his own name; & that B & C. shall each share $\frac{1}{2}$ of the purchase, at the price which A shall give for it, B & C. are not partners in the contract, which A makes. Their agreement is a sub-contract only. Wats. 45-8-1. Bbl. 37.

The Est. of deceased partner cannot be joined in an action with the surviving Partner as debt. at Law. Wats. 63- Com. 474. For one is charged de bonis testatoris & the other de bonis propriis. Wats. 49- Leath. 170-1- 2 Ecc. 221- 2 Bb. 290- vid ante 2. Post 8. 167. 9

It has been holden, that the Est. may & must join as Jt. with the survivor. Wats. 30- But this seems not to be law. Corp. 118- Salt 444- Shaw 109- Wats. 300. 1.

The Act of one Partner dealing for the Partnership, bind all, if it concern the Partnership. Wats. 49- 56- Hyd 19- 68- Gilb. Div. 117- 10- 3 Bac 590- 2 Bbl. 340- Com. 814- Bull 129- Doherty 175- 5. Mod 398- 6 R. 3- 6- Doug. 629 Wats. 60- 1- 104- 5- 229- 52- Demeaux 1 East. 48.

Paymt. to one is paymt. to all. Wats. 62- 100- 12 Mod 447- And one alone may discharge debt. Wats. 110.

4. Bill drawn by two payable "to us or order" *Part. p.*
makes the payees so far partners, that an endorsement
by one is valid. Doug. 653 - Wats. 233.

But no member of an incorporated company can
by this even act bind the company. Wats. 49 - 3 Bae 611-5
Hals 290 12 H. 345 - 5 Ray. 175 - 1 Wils. 152 - Hard. 405-1
Dow. 190 - Lalk 126.

The Stocks & effects put into Partnership become
common to all the partners, as soon as the agreement is ex-
ecuted tho they should remain in the safe or sole possⁿ of the
original owner, for each passes for the other, what is in his
custody. Wats. 52.

The Members of a Corporation are not liable
like partners, in their private capacities for the debt of the
company, nor is their private property liable. Wats. 653-
2 Bae 672 - 3 Ricc. 1. Whence originated the practice in Ct. of
taking private property on Exec. ag^t Towns, Soci-
ties &c. &c.?

III. Partnerships are either Special or General.
The former one established for a particular concern, the
latter for the ordinary concerns of Trade. Wats. 53-7-73-4.

Partnerships as contemplated by the English Stat^e
respect personal property only. Wats. 58.

Partnerships concerning as incident to accounts
are cognizable in Equity. 3 Bl 437 - 2 Vern 277-90 - Wats.
59-60 - 16 Vin. 243.

One Partner may discharge himself from future
contracts he made by the others, by a public disclaimer

A Partner ^{or} protest, or by giving notice that he will not be bound
 to the particular persons with whom the subsequent con-
 tracts are made, for that he disclaims the Partnership.
 Wats. Ct. 16 Vin. 244. But in such case an advertisement in the
 Gazette announcing dissolution of part^r is not of itself, suff^t evi.
 to discharge the partner from subsequent debts contracted with dealers. Thel. 385 b.
 If one of two partners becomes a Bankrupt & a
 payment to the other is a payment to himself & all the assign-
 ees for to this purpose the assignees are his partners.
 16 Vin. 745. 1 East 363. s. Wat. 62 - 12 Mod 447.

If one of two partners buys goods for both & the
 other dies, the former may be charged in Indebitatus & assumps-
 it general without any mention of the Partnership. Wats.
 623 - Comb 303 - 22 Mod 477.

When there are several part-owners of a Ship,
 the major part of them (in Interest I presume) may let the
 Ship or send her on a Voyage agt. the Will, tho' not with-
 out the priority of the others. 2 Ray 235 - Wats. 75. But the ma-
 jor part must give security in the Court of (Chancery)
 Admiralty for her safe return. Wats. 76 - 7. 2 Ray 235.

IV. Ship- Owners are Tenant in Common, Wats. 75 g.
 And if the Ship be converted by a Stranger Treason will
 lie for any part or Share. 1 Mod 309 - 6 Bulst. 84 - 75 Mod 3279.
 This by the *Mardine Spanos*. 5 Bae. 201. 2 Kins. 640. But
 this is contrary to the general rule of the C. 5 Bae 204 - 3 Leon
 113 - -

But one part owner of a Ship cannot maintain
 agt. his partner ^{this being} for his part. Ray 15 - 1 Leon. 79 - Wats. 75 b.
 1 East 363 - 3 Leon. 299 - 1 Mod 70 - Co. Litt. 119 - 200.
 See K. 290. Secus if the latter destroy the Ship. Wats. 80.
 Leon. 32.

But part owners of a Ship may sever the part ownership by the English law, whenever they please, by selling their respective Shares. Wats. 76. Part 1st

But by the Maritime law this cannot be done without the consent of all till one voyage is made. Marsh. Int. 318.

If one of several part owners, object to a voyage, proposed by the others, he may arrest the Ship & compel the others to give security for her safe return. This he may do by process of the Admiralty Court. Wats. by D. Ray 223. Str. 890 - 1 Wils. 101 - Ray 70 - D. C. 323 - Co. Litt. 200. & Jud. on this security a suit may be maintained in Court of Admiralty. Wats. 70 - D. Ray 235 - 6 Mod 160 - Holt. 647 - Contra 6 Mod 17 - 26 - 79.

In the last case the part owners who disagree of the voyage are not entitled to the amount of the profit. Wats. 79 - Str. 230 - 2 Ch. Cas 916.

But one of two Partners in trade may dispossess the whole property of the Partnership. Wats. 80 - 145 - Co. Litt. 445 - And if one become Bankrupt every bona fide sale of the other, not knowing of the act of Bankruptcy is good. Co. Litt. 445 - Wats. 140 - 4.

If one partner instead of advancing money gives a note to the other for his share & then become Bankrupt his assignees are entitled to half the stock & profits. Tho' the other has voluntarily discharged the note. Co. Litt. 462.

The Captain of a Ship is not as such a Partner Wats. 80. 1 - He is chosen by a majority of the owners in interest. 4 Inst. 146 - But he may maintain Trespass agst a Stranger for taking away the Ship. Dalk 10 - Wats. 81. -

Partnership being founded on contract, it must of course be done by consent of all parties, each of whom accepts & assumes of all the others as his partner. Mat. 100. Hence on the death of one partner, his exec. as such is not a partner to the survivors, unless it is provided in the Partnership that he shall be so. Mat. 294 s. 2 Ver. 33. Is he not tenant in common with them? 1 East 362. I think he is.

As to the assignees of one partner, he being a Bankrupt, are Mat. 294 4 Burr 2177. But they are tenants in common with the others. 1 East 363 O.

When the respective partners contribute equally in money, labour &c. the profits are to be divided equally. Mat. 105. See also, where contributions differ. As to the different modes of dividing the profits, where the partners contribute unequally. vid Mat. 100 4.

Partners are bound to use the same care in Partnership property, that they are in their own private concerns; & if any loss happens by any omission of this degree of care in either of them, he is accountable for it. Watts. 112 14 15.

Each partner may regularly sign for & in the name of the Co. - but he should do it for himself & Partners or in the name of the Firm. 2 Cas 56. 30. Salk 126. De Kay 14-54 170.

But this privilege may by agreement be confined to one or more of them. 10 Cas 16. Wat. 15. Ch. Cas 27-8 200. Salk 125-7. 217. 218. 72-112. Holt 297. 2 Esp. 135.

9.

How far evidence of custom is admissible on Part^r
this point. vid - Edly 20-9 - Burr 1216-21 - 13l. R. 295.

If a Partner exceeds his authority in any transaction, which occasions a loss, he must bear it - But in gen^l. the powers of each partner is general, in carrying on Trade. Mat. 115.

After a dissolution, as well as before, the partner who is in advance, has a Specific Lien on the common Stock, for a balance due to him from the others on the partnership account, and of this he cannot be deprived of, by the private debt, of the other partner. Mat. 120-9-25-6 - Wes 374-67-242 - 3 Cray 871 - 5 M 392. vid post 19. 6 Chs. R. 242. (vid post 19.)

The creditors of any one of the Partners cannot affect the common Stock, any further than the indebted partner could. Wes 242 - 3 Bro. Ch 457 - Mat. 125-9-215-6.

The Bankruptcy of one Partner dissolves the Partnership. 11 Burr 2174 - Coop 445 - Mat. 140-5-6-134.

The Dissolution of Partnership does not sever the real interest of the partnership effects, & they remain, whether the dissolution is by agreement or otherwise. In case of dissolution, each partner has no other right ag^t. the other, than to ^{pay} account, & the balance due him. Coop 449 - Mat. 140-5-6.

If then, a Dissolution happen by the death of or by Bankruptcy in, any one of the Partners, his heir or assignees hold with the survivor, as the Testator or the testator's heir did, i.e. the interest in Common^{ties}.

10.
joint Tenant, and subject to the same rights in the survivor. But it was before Subject Wats. 140. b. 294 s. (Coop 449).

But the Co. is not partner with the survivor, unless the partnership contract provides that he shall be so.

Hence also after the dissolution of a Co. one partner cannot maintain Trover agst. the other for a moiety of the Company's effects. Wats. 147. d. Nor can the assignees or representatives of the former. Dill 323. Co. Dite. 200. Salk 290. Coop 450.

If one Partner takes more than his proportion of the Stock, the other may come upon his separate estate pro tanto. 1. Salk. 225 - Wats. 140. 211.

As to the allowance made to Banrupt-partners under Stat. 5. G. II. vid. Wats. 152 3.

If money due to a Partnership is recd. after the death of one of the partners by a third person, the surviving partner may have Indeb. Assumpsit for it in his own right, and not as survivor. 2. W. 476. Desh. 110. Wats. 153.

Several partners cannot maintain an action on an illegal contract made by one of them tho' it was made without the knowledge of the others. 3. W. 454. Wats. 160.

If two persons incur losses in an illegal transaction & one of them pays the losses with the consent of the other & at his request, the former may recover a moiety of the latter in Indeb. Assumpsit. 3. W. 419. 1844.

377- Kyd 156 - Wals. 186-190.

Part. p.

If two persons are concerned in an illegal transaction which incurs a penalty, they are both liable; tho' those (there) can be but one penalty recovered. Com 616 - Wals. 191-2. length 171.

So it is said if one of the partners is concerned in such transaction on account of the partnership. Wals. 191. 2d Quere. Wals. 193-5 Com 619-20. But this rule seems to suppose the other parties privy to the transaction. Wals. 191-2 Com 619-20.

A contract which is immoral, being a violation of law, will not create a Partnership, tho' it be in the form of a Partnership Contract. Wals. 195. 201. Ely. A borrower of money who is obliged to convey on a trade, gives a Bond for the money & lawful interest & covenants at the same time, that the lender shall have a part of the profits of the trade. The Borrower & Lender in this case are not partners. The contract is usurious said Com 1793-4 N. 353.

Forbearance of a suit for 20 years between joint Merchants (their dealings having ceased for that time) is a bar for a Bill for an account in Equity Wals. 211-12. 2 Quere. 276. Gilb. Eq. R. 274.

V. As to How far Stat. of Limitations affects the Accounts of Joint Merchants vid Wals. 211-12 Cook's B. Prac. 688-10th. 305-2d. 120 11th. 220-13th. R. 683-6. 10th. 189-

Two partners agreed to borrow money; one of them gave his Sale Bond & the other witnessed it.

both become Bankrupt, the Obligor was allowed in Chancery to prove his debt agt. the Company. 1 Atk 225 - case cited in Wals. 229.

If two partners agree to pay a sum of money out of their own private Cash, they must be sued jointly on their agreement. 1 Atk. 236 - Wals. 229.

In actions by or agt. Co. partners, they must all be made parties. Wals. 239-3 - Esp. 117-10. If one sues alone on the contract, advantage may be taken of it in evi. under the Genl. issue. Stra 890 - Bull 159. If a Tenant, it is pleadable in Abatement. Stra 890 - Atk. 490 - Esp 411 - 202 -

If one is sued alone on a parcel contract, it is pleadable in abatement, only 2 Atk. 2447 - Wals. 240-234 - 235-40-4 - 5th edn 2611

So on a written joint contract 2 Atk. R. 697 - Crof. 152 - 5 B. edn 2611-14.

For 2 Partners one partner may be sued alone, 5 Atk 651 - But after severance one may sue alone on a contract originally joint. Wals. 233-4 - Esp 117-10.

If two Partners are sued and only one appears the jly. He may have Judgt. for the whole debt agt. the latter & for default agt. the former. 2 Atk 510 - Wals. 240-6 -

If one of two partners will not join in an action, he may be summoned & removed & if he will not then proceed the other has Judgt. quod sequitur Solvunt 2 Atk 510 - n - Wals. 246-7.

The discharge of a Bankrupt, under the Stat. of 4. & 5. Ann does not discharge the Partner, the other re. *Part.* *main* liable. *Wat.* 240.

A Bond creditor, to whom partners are jointly bound, generally may, on a commission of Bankrupt against them, make his election to come against the joint or separate estate, but not against both for the deficiency, & after the other creditors are paid. *1st* *W.* 107. *Wat.* 249.

If one partner being an Exor. or Trustee lends a Trust fund to the trade with the knowledge of the other - it becomes a debt in favour of the Custodian Trust against the joint estate. Secus, if done without the knowledge of the other partner. *3 Bro. Ch.* 265. *Cook.* *B. & F.* 306. *Wat.* 250-1.

If on the dissolution of partnership between A. & B, it is agreed, that A. pay all the debts, & a creditor knowing the agreement delays the collection for a great length of time, he is still not deprived of his remedy against both, even in Equity. *Stiles* 403. *1st* *W.* 603-2 *Reg. Cas.* *Ch.* 167-630-2. *Wat.* 251-2.

And subsequent to the time of delivering goods on a contract, it may be proved ^{or} *agreed* that they were delivered on a partnership account. But if there was no partnership at the time of the contract, no subsequent act of any person, who may afterwards become a partner will make him liable on the contract. *4 B. & F.* 239. *Wat.* 259.

A Partnership is not liable for the debt which one partner may incur in furnishing himself with his part of the original stock 4th Ed. 780 - Mat. 289 - 670 - 712.

VI. Partnership may be dissolved at any time by the consent of all the parties; but no one can dissolve it without the consent of the others within the time limited for its duration by the original contract. Where no time is limited any one may dissolve it by withdrawing himself; provided it is not done with any sinister views to the prejudice of the others, or at an unreasonable time, as when ^{some} particular business is begun. See Mat. 273-5.

Dissolution may take place several ways - as
1st By implication of time, i.e. by lapse of the time for which the partnership was created. Mat. 275.

2nd By dividend of all the Co. property, after a complete liquidation of all the Co. accounts &c. and.

3rd Partnership contracted for a single dealing is dissolved by its completion or close (See and.)

4th By Arbitration. If the partners by their submission authorize their arbitrators to dissolve. 2d Ed. 780.

5 By Bankruptcy of either of the partners. Mat. 282-3 - Cook 440-71 - A partnership debt will support a commission agst. that partner by whom the act of Bankruptcy was committed. Mat. 283-5 - 4th Ed. 134 - Cook B. & L. 201-2.

6th By the death of one of the Partners Mat. 294.

7th. Forfeiture on an Attainder of Treason or Felony. Wats. 209. Civilly dead - property confiscated. Part. 2. as to this in Ct.

The death of one dissolves the partnership, even as between the survivors how numerous soever they may be, unless the partnership agreement provides to the contrary. Wats. 294.

But a temporary lunacy in one, or derangement of mind (there being a prospect of recovery) does not dissolve a partnership. Wats. 295-8.

Partnerships by Farmers taking Leases are not in Equity completely dissolved by the death of one partner. Wats. 298-9.

Thos. partners are joint Tenants, yet for the advancement & continuance of commerce, there is no survivorship between them. The Dec. of the deceased becomes tenant in common with the survivor. Wats. 363. i.e., no survivorship in interest - for the remedies by which their interest is secured & their rights enforced do survive. Wats. 149-140-6-299-94-5. 124-302 - Salk. 444 - Esp. 110 - Polk 340-380-11 Co. 3-6. The Rule that there is no survivorship is founded on the Law of Merchants Wats. 299 - 2 Q. 182^a.

If on the death of one partner, the other continues the trade with partnership stock (I suppose) the latter must account with the Representative of the former for the profits made by continuing it. 1 P.W. 141 - 10 Clod 20 - 2 Eq. Cas. ab. 55-722 - Wats. 301-2.

Both partners being dead on a Bill for an account of Partnership a receiver is appointed in England. 2 Bro. Ch. 272.

If one of two partners signs a note in his own name only in a Co. transaction, both are bound by it in Equity. 2 Vern 277-92.

If on an account agt. one of two partners, partnership goods are taken & sold, the other partner is entitled to a share of the proceeds proportionate to his share in the goods. Dac. 627. 50 - Salk 392 - 1 Shaw. 173. post 10.

One Partner may maintain Indeb. Assumpsit agt. the other for money paid on a partnership debt after the dissolution 2 TR 470. 1 East 20. And if there are three partners & he sues but one & he does not plead in statement, he may recover the whole proportion of the two others from the one sued. 1 East 20.

An Obligation to pay to A. B. & C. partners all the sums which they shall advance to J. S. does not bind the obligor to pay what is advanced to J. S. by A. B. after C.'s death 2 East 334.

If one partner is charged beyond his proportion, Equity gives him a lien on the partnership effects 1 Ves 367 - 74 - 262. 1 Ch. Cas. ab. d.

A Contract with A. B & C. partners cannot be enforced by A & B, alone, tho they comply with Part. p. it after C. withdraws from the partnership. 7 Tl. 254- 2 Wbl. 532 - 1 Tl. 291

Where partners in trade become Bankrupts, the mode of settling the estate is to apply the joint property to the paymt. of the Co. debts. Cooks B. L. 209. 3 Bro. Ch. 457 - And the private estate of the partners (in the first instance) to the paymt. of their respective debts. 5 Durn 601 - 8 Tl. 142 - Wbl. 122-3-4-36-7-9-51-2 153- 215-16-18-49.

If there is a surplus of private property, it is all liable for the debts (for the debts) of the Company. 2 Bro. Ch. 119 - Wbl. 151-2-3- 2 Tl. 470.

If there is a surplus of the joint property and a deficiency of private, so much of the former as belongs to any of the partners may be applied to the payment of the private debts (of any of the other partners). 1 Ves. 242-52 - Wbl. 125-9-10 - Coop. 449. not can

One partner cannot recover by Indeb. Assumpsit a sum of money recd. by the others on the partnership account, unless there be a balance &c struck. 2 Esp. 96-7 Wbl. 227 - Otherwise if the money recd. be not partnership property. Wbl. 153.

After the dissolution of the partnership, the partners authorized to receive and pay the debts &c, cannot bind the others by giving a security in the name of

The firm. 1 MBl 155- 2 Ho. 260- Wats 270. Nor can either of them bind the others by new contracts. Wats, 270- Chitty, 30. But in this case notice is necessary as to 3^d persons. Chitty, 30. Vid. ante 6.

One partner cannot bind his Co. partner by D.C.C., without a power for that purpose by Decd. 7 MBl. 207- 4 MBl 213- 3 Bac 400- Chitty 20. 1 Com. C. 323.

Before the partners became Bankrupt the property of each both joint & private, is liable indiscriminately for any debt whether joint or private. —

If one of two partners is indebted in his private capacity, no more than his share of the joint property can be sold & appropriated to the payment of his debts. If more than his part be taken, as it might be, it cannot be sold on the ~~recoar~~ ^{recoar}. Cowp 449- 10 East 362 Wats. 121- 3-46 04- 4 Bac 460- Sil. C. 392- Doug 604- 30. vid page 19. Attachment. & ante 16.

A Sale of his part under recoar. makes the purchaser Tenant in common with the other partner. Cowp 449- 2 P. Ray 871- 1 MBl 392- 4 Bac 460- 3 P. W. 25- 12 MBl. 446.

If one of several partners contracts as for himself, without disclosing the Partnership. Still if the contract is in part made for the partnership, proof of this fact (tho it was unknown at the time of the contract to the 3^d person with whom the contract was made) will render all the partners liable Cowp 336- 814- Wats 42- 7- 63- 229- 40- 1 MBl. 45- 0. Doug 357- 71-

19.

A Contract by one of several partners relating to the Partnership business bind the whole. Chitty 23. J. Phil.
And even after the partnership is dissolved - a contract thus made will bind all, unless public notice of the dissolution be previously given. Bouss. 449. 514. Salk 292. 2 Bl. R. 990. Phil. 365. 6.

Thus much of Partnership;

Attachm^t. & In Attachm^t. of the Goods of a Partnership by a creditor of one of the partners is not valid ag^t. a partner after Attachm^t. of the same goods by a partnership creditor. 6 M. R. 242 - 11 Pl. Doug. 650. 4 Ves. Jr. 396 & 1 M. R. 175. Ingham v. Mansfield & Wainwright.

24.

A Sheriff may maintain an action against a plf. in a former action for service of the writ & storage of the property attached mesne process & for interest on paid & expended for that purpose

A Sheriff who knowingly takes insufficient bail is liable for the amt. of the plfs' judgment against the bail after deducting the value of that & the other judgt. ~~of~~ principal -



II. Sheriffs & Gaolers.

I am now to consider the Rights & Duties of Sheriffs & their under officers & also other topics which are difficult to be packed under other titles.

The word Sheriff in its Saxon etymology import the Governor of the Shire or County, a County or shire, he being the first executive or ministerial officer in the County 1 Bl. 349-12. For the manner of his appointment in England vid 4 Bac 431. 2-4-5. 1 Bl. 340-1. The Sheriff bound to take the oaths is a Sheriff of the County of London is only Sheriff of some 40. 1 Bl. 340-12.

Every Sheriff must reside in the County for which he is appointed & being a County officer he has regularly no jurisdiction out of his own County. This however is not universally true for if it be necessary for the purpose of completing an official Act, begun in his own County, that he should go out of it, it is in his power so to do. Thus if the Debt or owner of Goods attached, with whom it is necessary to leave a Copy of Process, live out of the County, or if he is ordered to bring a prisoner from his own County to the Court in an other, by an Plab. Corp: his authority does not determine when he reaches the Co. line: 4 Bac. 435.

And if a person escapes from the Sheriff & flies from one Co. to another, the Sheriff may pursue & arrest him in the other Co. The prisoner is here Retaken upon the same principle, for the Retaking is only a continuance & furtherance of his local authority in the original arrest. Plow. 37. 4 Bac 435. vid. post 277. & 54. 6.

And upon analogous principles he may do or rather complete official Acts after the termination of his office. & where he has seized goods ^{and taken} is removed

before the Sale; he not only may, but must go on with the Sale of them, altho. he is divested of his Office for the Exon. is one entire Act: the maxim being, that the Process is indivisible, is that one cannot begin & another complete, it being in Judgt. of law an individual act. Salk. 323. Cro Jac. 73-557. 1 Rolle. 843-4

And the same Rules as to local authority & completion of Process extend equally well to Con. Stables.

A Shf. may, at C. L. appoint Deputies or Under Sheriffs, who as his Representatives or Servants may execute all the ordinary & Ministerial duties of his Office. I say "Ministerial", because he has other duties, which none can perform, but himself. Hob. 13-4 Bac 437. Kirk. 240.

Every Deputy Shf. is removable at the pleasure of the Sheriff, for he acts as the Representative or Servant of the Shf. & by the authority which he has conferred upon him. But while the Deputy remains in Office his general Powers as Deputy cannot be abridged by any Act of the Shf. for the latter cannot say that he shall be Deputy & not have all the powers necessary for the execution of his Office - it would be to prevent the Exon. of the Power. Salk. 95. Hob. 13-4 Bac 437-40. 2 Brownl. 201.

In England the Deputy acts officially in the name of the Shf. only: for the Deputy is not known or regarded by the Law as an acknowledged Public Officer, but merely as the secret or official Agent of the Sheriff. And for the same reason at C. L. writs in all cases are directed to the Shf. & never to his Deputy - and tho' the Deputy may execute, yet he cannot return it in his own name, i.e. the endorsement of service must be in

the name of the Shf. Salk 96 Corp. 65 4 Bac. 437.

Shf. & Goalers.

But the law is diff. in Ct. the Deputy, being regarded as a Public Officer, may return writ in his own name; & it has been determined in Ct., that a writ directed to the Shf. only, may be executed by the Deputy & in his own name, whether the distress were general or special. Kirk 237.

I have already observed, that while the Deputy remains in Office the Shf. cannot abridge his powers; hence a Covenant, entered into not to execute process of a certain description, is void; as the Shf. would thus monopolize to himself the most profitable part of the business; for it is the duty of a Deputy & every Officer to execute any legal process, that may be offered to him. Hob. 14 - 4 Nov 438 9

A Deputy Shf. however cannot delegate his authority; for his own authority itself is delegated; and it is a kind of elementary principle in *jurisprudencia* as well as in Politics, that a mere representative or Agent, who acts by delegated authority, cannot delegate his authority unless specially authorized. Every man however who acts by virtue of his own Right may do this. As in the English Parliament one ^{Peer} may vote by Proxy; but an ^{ethy} cannot substitute without an express provision for that purpose in the power, as is often the case, and all upon the Law principle, that a Derivative power cannot be delegated. Salk 96. As to privilege of Peers voting by proxy - a privilege not extended to House of Commons. See 14th. 168.

A Deputy however may order others to assist him in the performance of his duties. As to order an assistant to make an arrest in his presence, but this is no delegation of authority or assignment of Power

1204d. 4 Bac 442 with m. & t. 3. He may depu^t one or more a writ D. R. 658.
 467
 1 Bac. Shf. 22.

There is a line laid down in this subject which requires a notification. It is said that one is not an ⁱⁿ assistant to a Dep^y Shf. is not good. This must refer to arrests made when the Dep^y Shf. is not himself present in pursuit of the same subject. See lead. 24. vid. post 41.

It is said, direct a warrant to two or more persons, either of them may execute it, for when an authority is given to two or more persons, of a public nature, it is several as well as joint, but if it be of a private nature it is joint & not several.
 1 Inst. 181. 4 Bac. 443-442.

If the Dep^y Shf. is guilty of any neglect of duty as by suffering an escape the Shf. may have an action on the case immediately agst him for he is himself liable once to the party injured. Besides it is a violation of the Dep^y's implied agreement, to do his duty faithfully which the appointment & acceptance places him under. Indeed every officer enters into this implied agreement when he undertakes the discharge of his duties. This is to the Public, but the agreement of the Dep^y Shf. is with Shf. for he is personally liable. 1. Role 90- 4 Bac. 442.

The Gaolers in the several Counties are the servants of the Shf. appointed & removed by him; for the Shf. is ex officio the Keeper of the Gaol in his own County. 4 Co. 34-9. 1619. H. Bl. 222.

The Shf. as Gaoler has no right to confine ^{of the Co} any person in any other place than the County Jail.

that being the place appointed by law for their confinement & if he does he is guilty of false imprisonment. A prisoner may have writ of Habeas Corpus & be discharged of course. Coalders vs. the Court. under a statute the Court said, for there may be provisions made by Stat. for imprisoning in New Gate or Penitentiary; but without such exception the Rule is universal, for he acts without authority of law. Hob 202. Patch 16-1 Sid 210- Salk 400-5 Bac 171.

The Shf. being ex officio Keeper of the Jail it follows, that he cannot be imprisoned in his own County & of course he cannot be arrested in his own Co. on Civil Process for an arrest is made preparatory to an imprisonment. & it has been determined in Ct. that if a Shf. has been thus arrested, the writ will abate. Hob 40-2 Bac 239- Hale, v 45. The Ct. decision is doubtful, I would think the writ would not abate. 2u?

If indeed there is a special Prison for common prisoners in the Co, as there is in England of which the Shf. is not the Keeper; I suppose he may be arrested & committed to it like any other person - but he cannot be made his own Turnkey - Our Laws do not provide for Criminal Cases, I presume however that from necessity the Shf. might be arrested & imprisoned in an adjoining County. This appeared to be the opinion of the Profession & Court at an incidental decision of the subject.

We had a case in a Middlesex Co. where a Marshal was confined & called for the Keys & let himself out. The Officer however suffered severely for an escape, for tho. our Stat. allows the U.S. the use of our Prisons, yet that does not constitute the Marshal Prison Keeper.

As the Under Shf. or Deputy is not a Representative or Servant of the Shf. it follows that the Shf. is

generally liable civilitur for the official acts or default of his Deputy agreeable to the maxim facit per alium facit per se. You will observe that civilitur is the emphatic word in that Rule. 9 Co. 98-5 Co 89-1 Roll 94-2 Leo 158-11 Co. 314-2 Ins. 382-466.

You will perceive that the liability of the Sheriff in this case is similar to that of a Master for the acts of his Servant; in consequence of this liability the Shf. is allowed to take security of his Deputies for the faithful discharge of their duties; for such bond taken by a stranger would be void. Stile, 10-4 Bac. 441.

On this subject of Sheriff's liability, the general Rule of law is that the acts of the Deputy to all civil purposes are the acts of Shf. so that he is liable civily for them, but not criminally; for to subject any person criminally he must have been personally guilty. 2 Co. Ray 1374-2 Camp 42-2 M 154-Satch 167-Croft. 330-11 Co. 232.

But the liability of the Shf. is limited to the official acts of his Deputy; for private tort committed by him in his individual capacity, the Shf. is not liable, as if he should commit a fraud. 1 Roll 94. Croft. 175-1 Leo. 146.

It has therefore been doubted whether if a Deputy levies an Exec. against a person the Goods or person of B. the Shf. would be liable, because on the one hand it is said he does not act in pursuance of his authority, so that he cannot be considered in law as the agent of the Shf.; But I take the Rule here well settled that the Shf. is liable, for the Deputy acts officially & the Rule which subjects the Shf. does not contemplate those acts which are con-

manded. If for neglect to serve process the Shf. is liable & yet he is not supposed to command an omission of duty, so that the reason alleged would certainly prevail. The Shf. is liable in any case. 4 Bac. 442 - 2 Bl. 832 - 1 Day. 42 - 3 W. 309.

Shfs. &
Gaolers.

And where the offence committed by the Shf. is with force, the Shf. is liable in trespass, so that the ground of the remedy is diff. from that which obtains agst. the Master for the act of his servant, who would be liable in case only; the reason assigned for the distinction is that the Shf. & all his officers are in law but one officer, which I confess does not appear entirely satisfactory to me. 2 Bl. 832 - 1. 2 W. 352 - 1 Day. 42 - 1. It is well established that Shf. is liable in trespass vi et armis in the case above. 1 Bl. 431. note 12.

11 Mo. R.
57. 14. 530.
2 T. 140.

For an omission of duty on the part of the Shf., the Shf. only is liable & not the Depty. If the Shf. has his remedy over agst. the Depty. & if he omit to execute process or suffers a neglect, escape; an action would not lie agst. the Depty. at C. P. for he is not considered as a known public officer. Suppose, the action were bro't agst. him for neglecting to execute process - the process must be given in evidence, and as it appears to be directed to the Shf. only, it will not support the action. Caud. 403 - 6. Salk. 10 - 5 Co. 89 - 2 Bac 2113. 1 W. 64. C. 603.

But for permissive torts committed by a Depty. in the discharge of his office, both are liable, the Depty. as well as the Shf., for the party injured may consider the party injured as more tortious & may not enquire by what authority he acts or where he takes the goods or etc. or even agst. the Depty. as the representative of the Shf. who is made liable;

The person injured is not bound to ask by what process or authority he acts, for that regards perfectly his private & not the public interest. 3 Mod 301.

On the other hand, the offence is by omission, the authority by which he is bound to act must appear, that being the ground of the action. 10 Bro. 217 - 1 Quest 106 - 3 Bro. 258 - 1 Bro. 446 Bro. 330.

To illustrate this in a case of a voluntary act. The Depy is liable, for it is a positive sort of misfeasance; his authority is no justification & he is liable as a trespasser would be, it is a voluntary breach of the law & therefore he may be subjected personally on grounds already specified & explained.

The Shf. is not liable for the act & default of a special Depy, appointed by the request of the Shf. in the action & by his nomination; as if he make a default in not executing the writ; for the appointment is made at the request of the Shf. & at his risk; But if the Special Depy should be guilty of any wrong & injurious act to third persons as to the debt the Shf. is liable; so that his liability in this case is only restricted to the Shf. who risks his own Right. 4 All. 120 - 5 Rep. D. 607.

In Ct. a Depy Shf. is considered as a known public Officer & is liable as well for default as positive act - for misfeasances as misfeasances, for he acts in his own name both in fact & in form - The endorsement of service is in his own name & he is liable precisely as extensively for his acts as the Shf. at the C. L. for his. & the Shf's liability in Ct. is the same as at C. L. - These Rules relating to the liability of Shf. for the acts & default of his Deputies apply equally well to the acts & of his Gaolers for as to this pur-

have they are his Deputies. 2 Ins. 302 - 2 D. Ray 574. Cro. J. 330. *Shiff. &*

After the death of Sheriff & before another *Gasler* or is appointed, if a prisoner escape, no one is liable at law for the death of Shiff. is ipso facto a revocation of the jailor's authority. Indeed all delegated authority ceases on the death of the principal; except Testamentary authority which in strictness cannot be said to be an exception. The only remedy then at C. L. in such cases is a new appointment, as soon as possible. The representative ^{of the} ~~are~~ not the representatives of the Shiff. & the jailor's authority is determined immediately 4 Bac. 445 - 3 Co. 72 - Cro. E. 366.

The only remedy then, is to have a successor appointed as soon as possible & have him retake the prisoners. There is however no inconvenience to be apprehended in this case, for the jailor would continue his authority de facto & rely upon the Legislature for an indemnity 1 Hall 14 - 4 Bac. 445.

I have thus far spoken of the character of Sheriff; his Relation to, & Liability on account of his Deputies - I am now to speak of

The Authority & Duties of the Sheriff & of his Subordinate Officers. 1 Bl. 343. - 4 Bac 445-9.

Shiff. & is a Judicial as well as an Executive & Ministerial Officer. But in New England he has no Judicial authority whatever. I shall therefore treat of him as a Ministerial Officer & a Conservator of the Peace, in which latter character he is strictly an Executive Officer - according to my understanding of the term "Ministerial Officer" is one who executes the orders in obedience of some Superior's commands i.e. by the command of some Superior Officer. Thus the Shiff.

acts in executing a writ or warrant. This is strict
 ly a Ministerial & not an Executive Officer, on the other
 hand is one, who obeys or executes the Law, with
 out any such command of a superior; as the
 Heads of Departments, acting in obedience to the law
 only, are Executive Officers. But their subordinate
 Officers, who act in obedience to their commands in
 executing the law are a Ministerial Officers. These
 then, are the two great departments of the Sh^{rs} powers
 or, as understood by our law. Is an Executive Of-
 ficer, he is the Conservator of the peace of the county
 & the first Executive Officer in the Co., or as it might
 be properly said, of the Co. or the highest Executive Officer.
 1 Bl. 313 1 Feb. 237 Stat. Ct. 304.

Is a Conservator of the Peace, the Sh^{rs} at
 Ct. may & must apprehend & commit to prison all per-
 sons, who break or attempt to break the Peace & may bind
 them to keep the peace, this binding over however is a
 Judicial Act, which a Sh^{rs} in Ct. is not authorized to do.
 He is also bound ex officio to arrest or apprehend generally
 all offenders agt. the laws; as Traitors - Misdoers & all
 felons & commit them to safe custody. To defend the
 Co. agt. not only Riots, & Robs^y, but agt. all enemies
 Foreign or Domestic; and this is one of his leading du-
 ties. & for this purpose he may command the posse
 Comitatus, or power of the Co. which at Ct. consists of all
 male persons over the age of 15, except Peers.
 1 Inst. 160 - 4 Burr 420-53 - 1 Bl. 443 - 4 Bl. 122. 147.

In Ct. a similar power is given to the Sh^{rs}
 & to Constables within their respective Towns. Stat. Ct. 384.

Is a Ministerial Officer the Sh^{rs}
 is bound to execute all legal process, regularly directed to
 him, & on refusal or neglect, he is subject to a Fine.

Imprisonment & to a civil suit on the case by the party injured by such neglect or default. *How 74. Dyer 60. 11th. 244 - Stat. Ct. 305.* But in civil process legal fees must be tendered to the Sheriff. *Shf. & Gaolers.* ~~Shf. liable~~ ^{as} ~~by~~ ^{by} Stat. of Ct. the Shf. is liable in a civil suit for neglect of duty (for which he is not at C. &.) as for neglecting to Return a writ in Ct. an action on the case lies for this. Indeed he is liable for not returning a writ as well as for not serving by the C. &. But the Process is a summary one, viz. by making a Rule requiring him to return it & if he does not, he is subjected to an attachment, as for Contempt & the fine then inflicted remunerates the party injured. *Doug 446. 2 H. Bl. 233. 1 B. & C. 50. 206. 3 H. Bl. 262. 291. Esp. D. 616. Stat. Ct. 601.* That fees must be tendered Shf. to compel service on civil suit vid. *Black. Shf. 62.*

It is also to be noted that the Sheriff is not bound to serve writs on the same terms as the Sheriff; he or his Shf. may do the same when necessary for the purpose of executing process & no person is obliged to assist several hundred to assist 2 *Ans. 192-453. 4 B. & C. 203-122. 147.*

We have a further provision not known to the Com. that if there is great opposition made or expected to be made to the execution of process the Officer may with the advice of a Justice or Justices levy a fine part, or even the whole body of the militia of the Co. to assist, i.e. in their military capacities & armament under their own Officers. He is to inform himself of the number of the militia of the Co. that is to be levied & shall return that he cannot execute the Process. *Stat. Ct. 384.*

There is a series of important Statutes relating to ^{man's} castle or mansion houses as to their privileges; when a Shf. is justified in breaking an Outer-Door or Window, or when not, for which I refer you to the title Trespass. 1 Black. 103. 4.

I would observe however if a person is illegally arrested by the breaking of Jail Doors or Windows & is charged with murder there is no fault with another process the latter is good provided there were no collusion between the parties in the action or between the officers but such collusion is now negated the whole. 2 B. & A. 23. 2 B. & A. 23. 1 D. & A. 129. 2 B. & A. 23. 2 B. & A. 23. 3 B. & A. 280 n. 3.

By a Stat. of 20. Car. 2. & a similar one of our own, no civil process can be served on Sunday & service on that day will be void & the Sheriff guilty of Prison Imprisonment. This you will observe is not a rule of C. S. but by Stat. 4 Bac 456-456- Stat. 307. 2 B. & A. 23. 1 D. & A. 129. This Stat. however relates only to original arrests; for if a person escapes on Sunday he may be pursued & retaken on that day or even if he escapes on another day he may be retaken on that precise day at C. S. - For the act of retaking is no more than the means of continuing the Sheriff's lawful arrest in Custody; and the Rule stands upon the same principle as that that the Sheriff may on Sunday guard the Prison Door, or resist an attempt made to escape on that day. 2 B. & A. 23. 2 B. & A. 23. 2 B. & A. 23. 2 B. & A. 23. 2 B. & A. 23.

In case of an illegal arrest on Sunday, the Court will order the prisoner to be discharged on a Writ of Habeas Corpus or he may doubtless be discharged on an Habeas Corpus. 6 Mod. 95. 4 Bac 456. In Ct. it has been decided that service was prohibited only during time of light & not the night.

Decision
June. 1800.

The Duties of a Sheriff as a Ministerial Officer to arrest & imprison lead to an important branch of the Law viz Escapes This is sometimes placed under the title of Habeas Corpus

on the case, but it comes as appropriately in this place.

*Shops &
Gaolers.*

Of Escapes.

When a person who is under lawful arrest & restrained of his Liberty either voluntarily or privately evades that restraint or suffers to go at large before he is discharged by due course of Law; he is said to escape or is guilty of an escape, & an escape then is the evasion of lawful custody or restraint 2 Bac. 233.

Of course it is essential to constitute an escape, that there should have been a previous legal arrest: for the evasion of an illegal arrest is at law, according to the definition given, no escape. Esp. d. 607-89 Case 65.

Is contradictory to the law of escapes we consider firstly that of arrest.

The arrest must have been made in pursuance of lawful authority. Indeed an arrest made not in pursuance of lawful authority is void & in itself unlawful & an offence. But I do not mean, that the arrest must in all cases, have been made in pursuance of a Lawful Writ or Warrant for a legal arrest may be made without a Warrant: as in that numerous class of cases in which it is made the duty of the Mag. to arrest offenders & he may arrest without Warrant. 4 Bac. 455.

Where the arrest is made by virtue of a Writ or Warrant, the Genl. Rule by C. J. to determine whether the arrest was lawful, is that if the Court upon whose authority the writ is sued, has jurisdiction of the subject matter of it;

the arrest is lawful, i.e. the writ will warrant an arrest; of course suffering the prisoner to go at large after such an arrest will be an escape.

This Rule presupposes the mode of arresting to be regular & lawful; for the arrest might have been unlawful from the manner of its execution, as by breaking an Outer Door & Window &c. but the circumstance of the Process being erroneous is no objection to the arrest, for when issued by good authority the arrest continues good & effectual to every purpose, until set aside by due course of law; whereas a void arrest is bad ab initio. 2 Bac 234-6- 2 Will 384- 8 Co. 140- 5 Co. 54- Stra. 509.

But on the contrary if the Court by whose authority the writ issued, has no jurisdiction of the subject matter, the arrest is unlawful; for the writ is void & of course the arrest must be. In such case therefore there can be no escape & if an Officer make such an arrest, he ought to release the prisoner as soon as soon as he finds his mistake 2 Bac 234- 6 & 7- 2 Will 384- 8 Co. 140- 5 Co. 54- Stra. 509.

To illustrate the Rules; The 1st Great Rule is that if the Court has jurisdiction & the arrest is lawful, then suppose in an action of Debt a warrant issued from the Court of B^e in England & the def^t is regularly arrested under it, the arrest is lawful. But on the contrary, suppose an arrest made under a Criminal Process, issued under a Law Court it is void, for that Court has no jurisdiction in Criminal matters & again, under our own Laws a Magistrate has no jurisdiction in cases where no more than \$15.00 is demanded. Suppose an action of Trespass Bre^t demanding \$15.00 on an arrest made under

the Magistrate's warrant is lawful. But if the writ contain a demand of \$50.00 the arrest is void & the Officer guilty of false imprisonment.

Shops &
Gladstone

But the first branch of this Rule of distinction is not universal. Attho' it is true and laid down generally. The last branch, that if the Court have no jurisdiction, the arrest is void, is universal; for attho' the writ or warrant might have issued from proper authority. Still the arrest might have been void from the irregularity or informality of the warrant. Thus suppose a writ issued to day & returnable in 20 years hence, or indeed any other time, than the next succeeding term of the Court, an arrest under it is void, for if only voidable, it could only be voided by the Pleadings when the cause came on; and if not void, one person might oppress another beyond measure, for the Deft. would be imprisoned during the whole time, a fine bail, which would be extremely difficult to secure appearance 20 yrs. hence.

Here then attho' the jurisdiction is complete, the arrest is void & of course in such case there can be no escape. 2 Wils. 341. Esp. D. 320-4. 600-9. Salk 273 - Brok. 140 - Car 140 - 1 Root 315.

In Ct. Mesne process does not usually issue from the Court applied to for redress, tho' it does sometimes; the Genl Rule therefore is not sufficiently broad to reach all arrests made under mesne process in our practice.

In cases of mesne process then, not covered by the Genl. C. S. Rule, the Rule in Ct. must be this. If the Process is issued by competent authority & returnable to a Court having jurisdic.

tion of the subject matter an arrest made under it, is invalid if the mode of arrest is proper; of course suffering a prisoner to go at large may be an escape. *B. & C.* If not surrendered before return of *Writ*.
 Writ is issued without competent authority or returnable to a Court having no jurisdiction. *B. & C.*
 In an action for \$100 before a single Magistrate or if issued by an individual. Singularity renders the process void as in England.

At *Common Law* an Officer having made an arrest cannot delegate to a stranger a right to hold a prisoner in his absence; *B. & C.* 21. So not even for a moment & if the prisoner swears that he is bound, the Officer is guilty of escape, the Officer in *the* event, from this Rule & *does not* have *harass* *ment* may go to sanction the practice, but the Rule of *the* *law* in England is well established.

II. *Act* An arrest must have been actually & *legally* made or there can be no escape. *B. & C.* 26. *Exp.* 404.

Bare words will not make an arrest, there must be an actual touching of the body or what is tantamount a power of immediate possession of the person & submission to it. *Exp.* 604 - *2 B. & C.* 236 - *Salk.* 79.

If the Officer says, merely, "I arrest you", & the party runs from him there is no arrest & of course no escape. If however the party submits & goes with the Officer the arrest is good without actual touching. *Salk.* 97 - 589 - *2 Bull.* 62. But if one be arrested & afterwards escape into the house, *shf.* may break door to take him; *1 Ven.* 306. As where one opened his count & *shf.* took him by the hand. *4 B. & C.* 405.

If one is arrested on the writ & while in custody a writ in ~~2d~~ manner is delivered to the officer agt. him, the Deft. by construction of law ~~is~~ ^{is} in the custody of the second writ also; of course if he is suffered to go at large the Officer is guilty of an escape on both. 2 Bac 236 - 5 Co. 80. Salk 273 - or 237.

I cannot say to what extent, this Rule would hold in Bt., but I suppose, the Deft. would be in custody of the second writ, when he has no personal property to respond the claim & when the Jtt. has directed the Officer to take the person. But the Officer need not arrest without these provisions. In England process of arrest is process of arrest merely; & therefore the Rule is well established there - But here the attachment goes agt. the person as well as the property.

~~The arrest is by a constable or other person authorized by law to execute the writ.~~

The arrest must be regularly, i.e., legally made, or generally speaking there can be no escape. Thus, in all civil cases, the arrest must be made by virtue of a legal writ or Warrant, & even then can be no escape 5 Co. 604 - 2 Bac 236 - Cowp 64.

The Arrest must be made by the Officer to whom the writ or Warrant was directed, i.e., he must be in Company with the person actually arresting; but the arrest may be made by the hand of a follower; And it is suff. that he is near & in pursuit of the same object Cowp 65 - 6 Mod 211 - 2 Esp 604. Vid. ante 27.8.

An arrest on the Sabbath being void, an Officer is not chargeable with an escape, if he let the prisoner go at large, for all arrests in England & Bt. (except for Treason, Felony or breach of the peace) on that day are void. 6 Mod 95. Salk 70 - 2 Esp. 2605-6-7. Vid. ante 36.

out his consent. 3 Bl. 415 - 3 Co. 52 - 1 Sid 330 - 2 Bac 239.

Shf. & Qualors.

I would here premise that every person committed to prison should be kept in safe & close custody "salva et arcta custodia". If the Shf. suffers the party committed to leave the prison but for a moment, he is as guilty of an escape, as if he had permitted him to escape for years, for the law does not distinguish between a reasonable & an unreasonable time. 3 Co. 44 - How. 36. 1 Roll 806 - 3 Bl. 415.

IInd Of Voluntary Escapes.

If a Shf. or

Qualor admit to Bail a prisoner not bailable, he is guilty of a voluntary escape: So if he consent to the prisoner's going at large for a moment, or beyond the limits of the prison, even with a keeper 2 Bac. 237 & H. auth. For the Law of Escapes, see 1 W. & A. Stat. 149. 50.

The Rule is the same if the arrest is out of town. & not committed; there is no difference between escapes after arrest & one after commitment. 2 M. 176 - 1 B. & B. 17-26.

Prisoners arrested on Criminal Process should regularly be kept within the walls of a prison. Those committed on Civil Process are sometimes admitted to the liberties of the prison yard, on giving security to save Shf. harmless. These liberties are however a part of the prison, for it is not meant by salva et arcta custodia, that the prisoner should be kept within the walls of the prison, when he has been committed on Civil Process only. In case of Criminal Process, the prison is not considered as extending over the Liberties. 2 M. 126. 131.

It has been decided in England that if a person, committed on Exon, is bro't up by Mag. Corp. & testificandum, it is a voluntary escape. 2 Bac 530 q. 1 Sid. 123.

But this does not seem to be law, for the Shf. act, in obedience to an order of Court, to secure himself from fines & Imprisonment. Bull 72 - 1 Root 72 - 12th. 137.

But if the person, who is bro't out of prison on a Writ of Habeas Corp., is permitted to take unnecessary or unreasonable liberty, it is a voluntary escape & the Officer liable. Thus taking him 60 miles out of the direct road to give him an airing &c. for he is bound to bring him to Court in a convenient time & in the nearest & most convenient way. 2 Bac 230. 12th 305. 12th 399-400. 4th Mod 70. 3 Co. Charles 14.

A Sheriff having made an arrest on final process must commit in a reasonable time, to prison, or he is guilty of a voluntary escape. So if he permits the Prisoner to go about with ~~in~~ his Officer. Lord. 2c. Arrest being preparatory to imprisonment - which must be in the Common Gaol. 1 Mod 24 - 2 Mod 176.

The Shf. has no right to discharge a prisoner committed on Exon, upon payment to himself of the contents of the Exon. But is liable for a voluntary escape if he does. 2 Bac 204 or 240 - 1 Sid 404 - 11 Mod 494 - 8 Mod 225 - 360 - This is not law in c. 76.

The Shf. is not the plf's Att'y & has no right to receive the money, not law in c. 76.

If a Shf. marries a woman committed on Exon, he is guilty of a voluntary escape; for a man can not be a tailor to his wife. 2 Bac 239 - 12th. 17.

If he appoints one of his prisoners Earn. Key, he is guilty of an escape, for by the act he removes the custody of the prisoner. (Esp. D. 600 - Hard 311.

17
Esp. D.
600-311.

If a Prisoner having the liberty of the Gaol-ward shows a disposition to escape, as by transgressing the limits; it is the duty of the Gaoler on notice of the fact to recommit him to the Wall; otherwise a subsequent escape is voluntary. 2 Bl. 131. But if he escape before showing such disposition or before it is known to the Gaoler, it is negligent - the Gaoler not being prior to it 1 Root 106-27 8 - 2 Bl. 131.

In other words, the admission of the prisoner to the liberties of the Gaol-ward does not render his subsequent escape Voluntary.

The Sh. is not bound to grant the liberties of the Gaol-ward upon a Bond of indemnity offered. It is a matter of discretion & indulgence; he may however lawfully do it & the Bond is of course legal; But he may recommit to the Wall at pleasure 2 Bl. 131. As to authority of C.B.P. to fix limits of Gaol-ward vid 4 Bl. 2. 361. Ch. J. Parsons's opin. 364. vid post 47.

III. ^{ndly} Negligent Escapes.

Are such as happen without the Officer's consent 3 Bl. 415. Thus if the Prisoner arrested makes his escape by fleeing from the Officer, or by violence or the escape is negligent: So if one escape by breaking the prison, or in any other way to which the Officer is not consenting, as by force. 2 Bl. 416 - Geo. 419.

So in an action for an escape agt an Officer, his endorsement of non est inventus is slight evidence that the Writ was delivered. Cowp 63-5. Vid post 57.

Difference between Escapes on a Writ & Final Process.

If a person is arrested on final process, tho' not committed, & is permitted to go at large for a moment, the Officer is liable for an escape, & this tho' enlarged on security given, that he shall be surrendered into the hands of the Officer, for the Bond, being illegal, is void. *Ex p.* 605-6 - 2 J.R. 172 - 3 Bl. 415 - *vid.* 10 Bl. Stat. 150.

But a person, arrested on a Writ process & not committed, may be permitted to go at large & not subject the Officer, if he be forthcoming at the return of the writ; and in Ct. he may let him go at large during the life of the Writ. That may be obtained agst. him for *Ex p.* Rule *vid* 2 Bl. R. 1049 - 2 J.R. 172 - 3 Bl. 415 - 5 J.R. 37 - Lath. 400 - 2 Wils. 295. & for Ct. Law see, Stat. Ct. 29 - 2 Livi. 174 - Turb. 204 - 302 - 434.

The reason of this diversity, viz: that what would not be an escape (in case of a person arrested on Writ process, nor a escape (in case of one arrested) on final process is this: that the Writ should not a final process is a coercive mean of obtaining payment; or it is a species of punishment, tho' not so in fact & holds the prisoner till he pays. In this case there is no discretion in the Officer to mitigate this kind of punishment & therefore he cannot enlarge him, that is thos arrested, even for a moment, without being guilty of an escape. But the object of arrest on Writ process is not coercive, nor to punish, but merely to secure the person that he may respond to any Judgment that may be obtained agst. him. This object of the Law is obtained in England, if he

forthcoming on the return of the writ: but as we
can obtain ~~the~~ writ here without personal appearance
of the defendant, it is said if he be forthcoming
during the life of the writ, and the ship is not liable if
he be (not) forthcoming before that has ended.

47.
Sect. 9
Exch. 28.

And this presents a case in which the of-
ficer is made liable for an escape by matter of fact;
or in other words, that which was not an escape, originally,
is made so by matter of fact. This escape how-
ever is negligent, not voluntary. 2 Dac 240 2 Roll:
89-807 Cro. Car. 623. 2 868 2 Will 294 Ex. D. 609.

But if a person, arrested on a *mesne process*,
is committed, the Jailor, by permitting him to go at large
even for a moment, subjects himself for an escape: for
on commitment every person should be kept "*salvo
et recta custodia*", & a return of the prisoner does not
bar the action, for by a voluntary escape the Jailor
loses the right of custody. 2 Will 294-1 Roll 807 Ex.
610- Salk 271.

The prisoner may however be enlarged
by Bail, if he applies before the time of enlargement, fix-
ed by the Court, is passed & he is not otherwise. This
Rule, that no person arrested on *mesne process* shall be
permitted to go at large after commitment, is not found
ed on any distinction between arrests on *mesne* &
final process, but merely on the Rule, that after com-
mitment, the prisoner has no right to Bail - But by
the Statute both of England & our own, he may take bail
after commitment. 1 Roll 807-2 Will 294- Salk 271 Ex.
D 610. vid ante 45.

And in this latter case, tho the plf. proceeds to take Judgt. agst. the original Degt. who has been permitted to escape the proceeding does not amount to a waiver of the action agst. the Quaker or Shf. but he may sue the Officer for damages immediately so that he must be responsible in all events. 2 Will 294 - 160p D. C. 11.

But by the St. of 23. Hen. 6. & a similar one in C. 1. a person committed on a Mesne process may be enlarged by shf. on a Bail bond. 1 Bac 275. 1 W. Bl. 474 - H. C. Tit. Bail.

For the escape of one taken on mesne process only, the remedy agst. the Shf. is an action of Trespass on the case - And then the damages are presumptive for the claim of the plf. agst. the original Degt. has not yet been liquidated & the plf. cannot support any claim or action agst. the Shf. unless he prove a legal claim agst. the party escaping; for unless he show such claim, it is *"injuria sine damno"* & he is entitled to no damages. The safer way therefore is to pursue the original Degt. to Judgt. before the action is brought agst. the Shf. 2 Will 291. 2 W. Bl. 129 - 4 W. Bl. 611 - 2 H. ad 73 & a c. 17.

I would here observe, tho it is a rule of evidence that any acknowledgement of the original Degt. may be admitted as proof in the action agst. the Shf; & it sometimes happen that it is the only remedy. This admission of the third party's acknowledgement in proof, is an exception to the general rule of evidence & is grounded in this: that as the Plf. would have been entitled to the Degt's acknowledgement in the other action, he may have it agst. the Shf. who stands in his shoes & in a great measure incurs his liability. Re. cas.

65-4. M. 436 11th Feb 169. vid post 50.

44.
Sh. &
Chanc.

For an escape on final process the Defendant
may sue at C.S. or by the St. West. 2nd & 1. Rich. 3.
Ch. 14. an action of Debt. because the Claim agst
the original Debt^r is liquidated or settled to a certainty, & the
Plf. is to secure what he goes for in money & not in
land. You will observe that Debt will not lie against a
surety on a final process, for the claim is not liquida-
ted, but in final process it is & in that state is trans-
ferred to the Sh. or devolves on him by operation of
law 2 M. 129. 134 2. 2. 153 - 2. 154 2. 155. 2. 156. 2. 157.
2. 158. 110-13.

These rules extend as well to escapes after
arrest on final process before as after commitment, for
by the terms of the St. there is no difference - The Debt
is liquidated & therefore both actions may be supported. But
there is an essential difference between the operation or
effect of an action of Trespass on the case, & an action
of Debt. In an action of Trespass, which may be had
for an escape either on final or mesne process, the Plf.
recovers damages for the Tort or Loss of the benefit of his
action, which damages are uncertain & which Tort is
Consequential. Whereas in Debt (which action can
only be had for an escape on final process) the Jury
are bound down to a specific sum of money to be
given by their verdict, which the Plf. goes for in nu-
mero & not in damages, the sum demanded is liqui-
dated & certain & the Debt immediate - 2. 154 129. Ch. 14.
609 -

Hence the recovery of damages agst the Sh.
in an action on the case, does not discharge the orig-
inal Debt. For the two actions agst the Sh. & Debt
are diverse intents - The action agst the Sh. is for dam-
age occasioned by the loss or delay of the original action:

There will, the 2^d of course, not be admitted nor as
restored. Hence the lawyers not anxious to give all the
damages to the original demand, yet they may & can
twice, ought to do so. *Calder*, 17th 3 - *Poussar*, 124 2^d 4th
124. *Widest* post 70.

And hence also the original defl. is not dis-
charged here pecuniary up. The Ship It is a Rule of ev.
that the party escaping is a competent witness up. the
Ship. for he is not interested it is said. This appears to be
thick drawn too universally in the Books; for such a
dimany might warrant action up. the party escaping.
Ab. could it be to the Rule of evidence.

On the other hand, if Special Damages only are given asst. the ^{1st} the P^l may recover agst the original debtor. 2 S.R. 529. 2 Wils. 295.

But if the Plf. brings an action of Debt against the Shp. as he may for an escape or final process the Jury must if the Shp. be found guilty, give the whole sum or value of the Person & the Costs of the original action: And such a recovery is a complete bar to the Plf's claim ag^t the original debtor. 2 Bl. N 1040. 1041. 1042. 2 T. R. 156-7-32. (vid ante 49).

The principal on which the Rule of damages here prescribed is founded is this, that when the action is brought ag^t the Sh^f. he is considered as the debtor, on the debt is transferred to him - vid ante 49.

Our Stat. seems to require, that in case of a voluntary escape from prison, whether on a Respite, or Final process, of whatever form of action it may be, the Plf. shall recover of the Def. the whole of the original debt or damages. St. Ct. 222. 336. And by Stat. of 1856. 150 if he may recover the amount he pays a good defence. Our Stat. (yet) then if this be the true construction gives the same Rule of damages in all

cases of voluntary escapes from prison as obtained in Bay
land only in the action of Debt for escape on final process. *Shars. & Hoole. 2.*

If a person, arrested on mere process, but not committed, is rescued, the officer is excused. Scias, if arrested on final process for this case he ought to have sufficient force, the posse comitatus. This reason does not appear to justify the distinction, neither does the one given by Es. pinasse, that in the latter case the Shf. is supposed to have time to guard agst the rescue. The rule, however is well established. 4 Bac 240 - 3 Bl. 416 - Cro. J. 419 - Cro. P. 873 - Esp 610.

But after the Def. is arrested on mere process & committed, rescue is no excuse for the Shf. unless made by Public Enemies, or the act of God. So that rescue by Robbers, Traitors or Insurgents is no excuse. No power except that of Public Enemies or the act of God, being admitted to overcome the Shf. with the posse. Esp 610. 1 Roll 200 - Stra 402 - 1. Co. 84th - 2 Bl. 113. 1 Selw. 655. note 110.

The same rule holds when one is arrested on final process, whether committed or not.

In cases of rescue where the Shf. is liable as after arrest on final process, the Plf. may sue either the Shf. or the rescuers, at his election. But if the action is agst the latter the Shf. is discharged according to Es. pinasse, whose dictum is not always good law. In this however he appears to me to be right for by a suit agst the rescuers the Shf. is held into security & is freed by an action when unprepared either for it or for an indemnification from the rescuers. Esp. 610 657 - 9. v. Lloyd 211. Hull. 90 - 4 Bac. 399 - Cro. Ch. 177 109.

It is said that the action agst the rescuers may be either Trespass, or Case. Yet I think it

not law for there two actions to lie for the same offence. I apprehend Sirhass on the case would have been the only proper action; for the injury is plainly consequential if the Shf. has met with direct injury, he may have a Assault & Battery; the Rule is well settled however that both actions will lie. Hob. 100 Bro. J. 406-4 Bac 399.

And the Original pff. may maintain an action agt. the rescuers, whether the arrest were on final or mesne process. If the arrest were on final process, he has a twofold remedy; if on mesne process, his action is agt. the rescuers only. Bro. J. 406 Hob. 100-Att. 98. Cro. Charles 109.

In an action agt. the rescuers the pff. may give either the whole or a part of the Pff's original demand agt. the party rescued. If only part, the Pff. may still proceed agt. the original debtor or party rescued & enforce his claim agt. him. 6 Mod 211 Esp. D. 657-9.

In proceeding on the subject of Rescues I would observe further, that in an action agt. the Shf. for an escape on mesne process, if he returns a rescue of the process, it is conclusive evidence in his own favour & if the return in fact was false, yet the Pff. is defeated. He is however entitled to an action agt. the Shf. for the false return & then if the Shf. pleads a rescue, it may be rebutted by contrary proof, so that he may thus recover his original claim. Bro. C. 701. Comb. 295-1 Ven 224-2 H. 175.

Tho' this Rule is apparently inexpedient & the reason of it at first not very obvious, yet it is founded in principle. "Such Official acts should not be falsified, when they arise incidentally in a suit com-

Sigs. &
Gualers.

meant for another purpose; Not in an action for that intent, if any proceeding distinctly contrary could be shown. But the rescue in issue, the return may be falsified.

I have before observed, that the Rescuers were liable to the Plf. in the Process. The Shf. may also maintain an action on the case agtst the rescuers. But I trust, he can have this action only, where he is himself liable to the Plf. - The object of the action ought to be to indemnify him. So if the rescue were on a Mesne process before commitment, he ought to have no action, because he is not liable to the Plf. But if the rescue were made on final process, or mesne process after commitment, his own liability should certainly entitle him to an action. The Prohibition is laid down in the Books too general. Hutt. 90 Crobb. 77-109 Hob. 100.

But if the Shf. brings up a prisoner on an Hab. Corp. rescue is no excuse for him. The same reason is here more palpable, for he has had time to prepare the posse comitalis & better command of it, in the vicinity of the Court & prison Str. 402 - Esp. 610.

After a person arrested & is actually committed, even on mesne process - Nothing but the act of God & Public enemies will excuse the Shf. in case of an escape. Thus in the case of St. George Gordon's riot, where a mob of 20,000 people, opened the prisons in London; Parliament found it necessary to pass an act of indemnification to the Shf. who would otherwise have been liable to every Plf. for the escape of their respective prisoners. A similar case occurred at the great fire in 1666 about the time of the restoration; so that the conflagration of prisons occasioned

otherwise than by Flighting is no excuse for an escape
4 Co. 84th. 2 Bl. 113 11 R. 709. Esp. 610. 2 Bac. 247. 1 Sch.
655. 5 Burr 2812.

There are some diversities to be observed between the
Consequences of Voluntary & Negligent Escapes.

It was formerly holden that in cases of Voluntary
Escape the Plf. lost all claim on the party escaping, who was
absolutely discharged & his liability transferred directly to the
Shf. This rule so vindictive in its effects upon the Shf.
has been reversed by Modern Decisions. It was not I think
good law for by it the Plf. was compelled to sue the Shf.
only, thereby losing his election to sue the original
Debtor who was completely exonerated from his action.
Hob. 202. 2 Bac. 237.

But it is now settled that the Plf. may accord-
ing to circumstances have a new action of Debt agst
the original Debtor, or by a Sci. Fa: a new Exon on
the original Judgment. & such new Exon by Stat. 8.49 Wm 3.
he may obtain a new Exon on the original Judgment with-
out a Sci. Fa: or he may retake the party escaping
on the original Exon; at C. D. so that he has a number of
remedies. 1 Bac. 196. Hob. 60. 1 Sid 330. 2. Hob 136. Wm:
11. 269. 3 Bl. 415. 10 R. 611. Bull 69. By 1 Stat. 4. c. 15.
Shf. may recover the amt. he is compelled to pay of the escape.

And where there is a Voluntary Escape of
one committed on Mesne process, the original D^g or
party escaping may be retaken by the Plf. with what is
called an Escape Warrant, even tho' he be in another
State or part of the Country. This Warrant alleges
the escape & directs his apprehension & return to pris-
on, & is the only remedy in this case. 3 Co. 52. 2 Wils. 295.
= 10 R. 611. vid Stat. 156. 150.

But the Officer, suffering a voluntary escape can never retake the party escaping, nor maintain any action agst him for escaping, he himself, being particeps criminis. The remedy in this case, as before mentioned, are only for the Sh. & not for the Officer. 3 Bl. 415 3 Co. 52 - 2 Id. 176 1 Sid. 330. vid. Carter 1 Stat. c 176/50.

And if an Officer, after having permitted a voluntary escape, should pursue & retake the party escaping, he is guilty of false imprisonment, for his authority over the party, is ipso facto forfeited. 1 Ven. 269 Carter 212. 2 Id. 176. But if Guard so closely pursue prisoner, that he retake him without losing sight of him, tho' beyond limits of yard it is no escape - but if he kills prisoner it is. 2 Hawk. c. 178. 1 Hale. 602.

And a Bond to save a Sh. harmless for a voluntary escape is void, as agst law, as it would probably cause collusion between the parties & encourage escapes. The Bond is void on the same principle, that one to indemnify a murderer would be - 1 Pav. C. 196 7 2 Bula 213 10 Co. 100th.

But the Off. in the process may retake the party escaping, even tho' he has pursued the Officer to a Sh. & recovered part of his original demand, provided he has not recovered the whole from the Officer. Bull. Reg. - 1 Cr. p. D. 611.

But when the escape is negligent the Officer may retake or have an action agst the party escaping & this immediately, i.e. before he has been subjected himself or sued for the escape, for he is himself, liable in statute, & indeed might otherwise lose his remedy by delay. Cr. b. 234 53. 3 Co. 52. 1 Bac. 456 Cr. p. D. 612 13 Inst 149.

And if a Bond has been taken to indemnify the Sh. for a negligent escape he may take his remedy on the Bond, for it is lawful & he is not particeps criminis. 1 Root 157.

The Sh. Bailiff cannot at Ct. have an action agt. the party escaping, tho' he subjects himself by it to the Sh. for he is not liable to the Sh. in the suggestion, tho' being a known public officer & his contract with the Sh. not being admitted as evidence agt. the party escaping, is of no avail to him.

The Condition of the Bailiff is then, in theory, a hard one, but not so in practice: for he might suppose sue the escaper in the name of the Sh. & the Court of Ch. would compel the Sh. to permit it, on security given not to abuse the name. Cro. 549 Corp. 2. 613

And in Ct. & New York it has been determined that the party escaping may be retaken, by virtue of an escape warrant in another State. 1 Root 107 4 Johns. 1. And in Ct. it has also been determined that Bail may be thus retaken. 10 2 Ct. & Rep. 5

If a person is arrested on Criminal process & escapes he is punishable with fine & imprisonment & if he commit prison breach, he is guilty of Felony by Ct. I believe this is decided here by consent & I do not recollect any prosecution for prison breach. The English law is not law in Ct. 1 Bl. 129-30 2 Hawk 122-8. 1 Stat. c. 150.

If a Sh. having arrested a felon suffers even a negligent escape, he is guilty of a misdemeanor & is punishable by fine. But for a Voluntary escape he is guilty of Felony, or punishable as accessory after the fact. 1 Bl. 130 1 Stat. c. 590 2 Hawk 134. 1 Stat. c. 150.

And this whether the offender was actually committed or under a bare arrest; but the Officer is not punishable till sentence is passed agt.

the original delinquent; but before conviction of the principal offender, the Officer may be fined & imprisoned as for a misdemeanour 4 Bl. 131. 1 Hale 26589. *Ind. & Quod.*

When a Shf. has been compelled to pay Debt or damages to the Plf. for a negligent escape, he may recover agt. the escaper by Ind. & Assumpsit as for money paid laid out & expended for his use. And it is a General rule that if one pays money for another he may have this action. Indeed it has been decided in England in one or two cases at a Vice Prince that where the Shf. had been subjected by a voluntary escape he might have Ind. & Ass. agt. the escaper. Lord Kenyon has decided differently (see the next Question). *simon-Case D. 612 - Pea. Cas 146 - 2 T. R. 154-6.*

In case of a negligent escape when the Shf. retakes the escaper, on fresh suit & before action is brot agt. himself, his own liability is discharged. The words "fresh suit" here tho' always used, is determined to be migratory, for if the recapture be at any distance of time or place, before action brot agt. himself, it is a "fresh suit." *Case 611 - 2 Burr 247 - 3 T. R. 908 - 3 Co. 44 - 52 - 2 T. R. 126. 1 T. R. 211-17. 1 Root 156.* (It must however be explained in England. *see* in 64. 2. T. R. 126. 1 Selw. 656.

But if the action is brot agt. the Shf. for an escape, before recapture, a subsequent recapture does not discharge him; for the Plf. by commencing an action agt. the Shf. (where the action is well founded) has attached in himself a right of recovery & it is a genl. Rule that he cannot be defeated by any act of the Shf. *Bro. & 657 - 873 - Bro. & 657 - 3 Co. 44 - 52 - 1 Roll 200.*

Indeed it seems immaterial, in what way the party escaping is restored to custody before the action is brot. agt. Sheriff, for it is the same way how the S^h is discharged. It has been determined that a voluntary return of the prisoner before the action brot. agt. S^h is being equivalent to a recaption, on fresh suit. Com R. 554-1506126-10350. 413.

In case of Voluntary Escape on the other hand, recaption is no excuse, for the S^h has no right to retake; that Right being vested solely in the P^l. Recaption cannot avail the S^h because he cannot hold the prisoner, without incurring false imprisonment. He is, in fact, considered as participating criminis. 3 Co. 53. Rep. D. 611-12.

Besides, another principle prevents recaption: a Pledge or Right of Custody, once voluntarily relinquished or suspended is abandoned forever: like a Pier or Wharfe, if once lost, it is so forever. For in this case with the voluntary return of the party, escaped until the S^h at all: he is liable from the moment of the voluntary escape & the P^l's right of action agt. S^h is complete. 2 Wils. 294. Salk 271. Rep. 612.

For with a subsequent assent of the P^l in the action, purge a voluntary escape - He may still sue the S^h or retake the party. Rep. 612. Salk 271. But if the escape is negligent the S^h may, for his own security, retake, even after action is brot. agt. him.

I have observed, that after a Negligent escape the S^h or Gaoler may retake the party: but if after that the prisoner is dis-

Shf. &
Groves.

charged by the Plf. with the Debt & Damages, the Shf. is not
or cannot take him for his own good. He might
have detained him before the discharge, the Officer's sin
on him is lost, he is the law of the prison & by his own fault,
he not his, his consent. His fault is more lost, the
not any great crime & accordingly is punishable only
as such by these means. The gov. Rep. 2. 611

When a Prisoner having the liberties of the
Court yard escapes, or retaking on a fresh suit on Vol-
untary return by the party escaping, before the action
is bro't ag't the Shf., discharges the Shf. In such case
if the Shf. has a Bond of indemnity from the prisoner
he may recover on it, even tho' he is not liable to the
Plf. — However as he suffers nothing from the Plf. he
will recover nothing but nominal Damages. 1 Root
106-7-127. As to Shf's liability for taking insuff. Bail
according to decisions in the United States, vid page 69.

The Shf. in such case may insist on a sub-
stantial remedy being taken ag't the Bondsman, i.e. Debt
& Damages: This he may do by refusing to take him up
for his return; but in this case he is liable over to the Plf.
for the whole. 1 Root 128.

And when the Shf's liability is barred
by the Stat. of Limitations he cannot recover full dama-
ges ag't the original Debt on the Bond of indemnity.
He can it is true recover nominal Damages; but if
by the Stat. he is not himself fully liable, he ought not
fully to recover. 1 Root 120-151

And if a Debt is recovered ag't the Bonds-
man before Recaption, audita Quarela lies. 1 Root 157.
For the object of the Bond is to indemnify the Shf. ag't
the claim of the original Plf. & in the case supposed that
claim is barred.

In saying a *shf.* for an escape, it is an established rule, that under a Count for a voluntary escape the *shf.* may give in evidence a negligent one. So too for the same reason he may plead to the Count for a negligent escape, a retaking on fresh pursuit & that he may plead without traversing the Averment, that the escape was voluntary, for it was importunate in the *Plf.* to allege it & no answer necessary to his action. The *shf.*'s plea is *prima facie* good & if he demurs it will go for the *shf.*. The *Plf.* is here to counsel himself of the distinction between Voluntary & negligent escapes, by making a *traverse* & assignment, as a replication to ⁱⁿ answer to any defence that may be made ag^t a negligent escape. It is by the way extremely unnecessary to set forth a Voluntary or negligent escape in the Count, for in the Decree you have nothing to do with any distinction between Voluntary & negligent escapes. Mon. 21. 17. 2 Pac 240. 2. 2. 126.

I have observed already, that for a voluntary escape, the Under-*shf.* Dep^y or Quaker who permits it is liable as well as the *shf.* If then the *Plf.* sues the Under-*shf.* the *shf.* (it seems) is discharged. This rule *Cassini* lays down on his own authority only, & though doubtful to some from that circumstance, yet it is correct on principle. *Rep* D. 612.

If after an action br^t ag^t the *shf.* for an escape & before plea pleaded, the *Judt.* on the original action is reversed, the *shf.* may plead *nil dil record* & thereby defeat the action ag^t himself. For the *judt.* on which the action ag^t the *shf.* was founded is annihilated by a subsequent one. But if the *Plf.* recovers ag^t the *shf.* & has *exon.* & after

That the original *Judg.* is reversed, yet the *Judg.* for the re-
verse remains good & cannot be impeached for it is nei-
ther erroneous, nor void. The Remedy for the *Judg.* then is
a writ of *Quida Buerela* by which he shews, that for this
matter *ex post facto* (the reversal of the *Judg.*) the Crown
is unjust. 8 Co. 142. 3^d. Hob. 209. 2 Bosc 240 3 Leod. 325.

61.
Shgs. &
Gaolers.

A Voluntary, & on some occasions a *se. fac.*
of the *Judg.* & *Officer*, if he *submits* it, & *delivers* out
does not. And the reason is that the former is a crime, the
latter a mere civil misfeasance. 11 Co. 272. 3 Bosc. 242.
H. 84. 3 Leod 146. 2 Bosc 240. 2 Leach 136.

False Returns & certain Misfeasances

If a Sheriff make a false return on a process,
he is liable to an action at the Law in favour of the par-
ty injured; as where he makes return of service on a writ,
where there was none. *Def.* may sue him & recover all
damages. 2 Esp. 615. 1 Wils 336.

In Ct. when a false return is made, the *Def.*
in the action, is at liberty to falsify the return by a plea in
abatement & thus defeat the action. In England this
could not be done by Ct. for this official return can
there be falsified only by an action instituted for that
purpose. And it follows in Ct. that if the *Pl.* is thus de-
feated he may maintain an action at *Law* the *Judg.* for
the loss of & recover damages, arising from the
loss of the action. But by Ct. as well as our own if
the *Judg.* makes a return immediately disadvantageous to
the *Pl.* he may in all cases have an action at *Law* the
Judg. as in case of a false return of non est inventus, which
is injurious only to the *Pl.*: False returns are generally con-
sidered at Ct. as injurious to *Def.* 6 Co. 729. 1 Stra. 654. 2 Esp. 616.

With regard to the Sh. of Gaols and Prisons, the C.D. make it the duty of the Sheriff to provide them; when, therefore, an escape happens thro' the insufficiency of the Gaol, the Sh. is liable, for it is his duty to provide & keep in repair the prisons & reimburse himself out of the County, 1 Co. 84. Roll 200.

In Ct. on the contrary, Gaols are built and repaired by the County: and it is the duty of the Magistrate as the Executive Officer of the Co. to build & keep in repair the Gaol & to raise money by a tax to defray these expenses. And a Mandamus issues if necessary to compel them to do it. If then an escape happens thro' the insufficiency of the prison, the Co. & not the Sh. is liable, unless the escape indeed were facilitated by the misconduct of the Sh. or Gaoler Stat. Ct. 200. 2. Root 450. The law is the same in Ct. tho' the Sh. is liable in the first instance 2 H. B. 546.

The remedy under our St. aft. the Co. is by Memorial or Petition to the Co. Court - An action would not lie - and as the Court is supposed in Ct. 2, the party has in all cases a right to appeal to the Supreme Court. Stat. Ct. 367-8 - Root 155-8 - 275-8 - 357-450 505 - 2 H. 30. In Ct. an action lies by Sh. ag. the Co. 2 H. 506

But by a course of decision the liability of the Co. is in most cases nominal, tho' these decisions may be properly questioned. Thus it has been determined, that if the party is able to pay the Sh. must resort to him - and if he is not able, the Sh. has really suffered no damages - and the Co. is merely liable for ^{nominal} special damages. Root 310-1 Root 126-55 - 2 H. 357-515

I now I do not see the principle on which these decisions are made. The original liability of the Sh. at C.D. is transferred to the Co. & it would seem, that the same Law ought to apply in both cases. However if the

Debt at the time of escaping was of a bility to pay the Debt, Stas. & Cholera.
 but, by the escape was enabled to evade the claim; I suppose the Co. on the old principle here laid down would be subjected to the whole claim. And it has been determined, that the Co. was not liable if the party was rescued from the prison, by outward force, when the prison was otherwise strong enough to secure the prisoner; this seems like Head & Tail. 2 Root 196.

If a creditor voluntarily discharges from custody a debtor taken on Capt. he can never afterwards retake him, or otherwise enforce the Judgt. agt. him, whether he were actually committed or not; for there is artificial reason that the possession of the body is deemed a satisfaction for the time being; & the creditor having obtained what is deemed his best remedy, must abide by it, and if he voluntarily relinquishes the Prison, the Debt is extinguished forever. 4 Burr: 2482 - 7 T.R. 420 - Strab 623 - 653 - 1 T.R. 557 - 6 T.R. 525 - 8 T.R. 123.

And tho the Pif. in Exon. were to discharge the Debtor on cons. of a new promise to pay the Judgt. debt & the promise is not fulfilled - still the Rule is the same - Pif. cannot retake & maintain Debt on the Judgt. He may however maintain an action on the new promise, for which the discharge was a good cons. - The Pif. has a right to discharge, altho. it would be a crime in the Shf. to do it. 4 Burr 2482 - 1 T.R. 557 - 6 T.R. 525 - 7 T.R. 420 - 2 Leach 243 - 420. 5 John. 364.

But the Judgt. will remain discharged in such case, even tho. the bare agreement should be defeated afterwards for informality & in this case the Pif. is remediless. 1 T.R. 557 - 6 T.R. 525.

And on a Bond conditioned for rendering again in
 & for ^{given by} person once taken & discharged by Plf.; this is void
 as agst. law; it is a Bond for false imprisonment, the case
 is the same as if the Def. had taken the Bond; it is a
 Bond for false imprisonment - The Pledge is abandoned -
 (it has improperly been determined otherwise in Connecti-
 cut 2 Root 133) - 1 Burr. 242 - 2 East 243.

It is a general rule, that a person who is
 a debtor to another, cannot discharge his debt by
 a discharge of the whole debt, but both; because
 the other must be discharged by a Hab. Corp. - but
 the principle, that the release of a prisoner, waives
 release of his debt or obligation according to a former
 rule that "if he is bound to pay the whole, it is an ex-
 tinction of the whole debt." 11 Hk 574 - 2 Chy 694 -
 Crook. 351 - 1 Hk 92. 5 John. 364.

But under the same Merchant the hol-
 der of a Bill or Note, having taken an Indorsement, dis-
 charged him from custody without actual satisfac-
 tion, may sue another & 11 Hk 1016, or the Drawer,
 or a Maker or Acceptor & discharge them successively;
 for they are not joint, nor joint & several debtors - each
 one being bound distinctly, severally & independently, by sep-
 arate Covenants. 2 Bl. R. 1235 - 4 Hk 825 - Chitty Bils 115-24.
 2 Shaw 401.

It was formerly decided in England
 that if a Sole Debt imprisoned on Exon, died in pris-
 on the Debt was forever discharged - This was partly
 on the ground, that the party having elected the highest
 remedy must abide by it & partly on a Quaint applica-
 tion of some Scripture Doctrines. 2 Bac. 354 - Hob.
 52. Crook. 850 - Crook. 136-43.

Now if one of two joint debtors has in his mind died, the debt as to the other was never supposed to be discharged, 5 Co. 86. Cro. 850. Cro. 136 43

Sigs. & Gholers.

And now by the Stat. of 21. Jac. 1. which appears from its phraseology to be declaratory, the language of it being "it is declared, explained & enacted," that where a sole debt, dies imprisoned, the debt is not discharged; But the Plff. may sue out a new C. on. agt. the estate as if there had been no prior exon. So that the old decision of the courts seems to be overruled by the Legislature; & see Legislative exposition of the C. 2 Bac. 354.

A Penal Bond to the sh. condition (i.e. that the obligor (the Prisoner) shall remain a true prisoner until the Debt fees & expenses of Bond are paid, is wholly void agt. the Stat. of 23. Hen. 6. called the Stat. of "Peace & Quietness", which Stat. provides, that a penal Bond to the sh. by the prisoner, for any other or purpose than to remain a true prisoner, is void" to prevent extortion by the sh. On the ground that a recovery on such Bond must be of the whole penalty, which is commonly double the sum due. In Ct. such a Bond, has been held void in part. 1 Root 158- 1 Ven. 237- 1 Paw. C. 173- 1 Pitt. 195- 10 Co. 100- How. 60- 2 Nib 351 Hob. 14- 4 Bac 461- 10 Mod 15- 12 H. 633.

By the way, I doubt much whether it would not be good policy to consider the Bond ^{valid} in this State & in every other where the penalty can be recovered. The Stat. arose in consequence of the then existing rule of a recovery of the whole. But in Ct. a Penal Bond is precisely the same as a single B. & that would be good even in England for debt fees &c. So that the Eng. principle of policy would not prohibit its recovery - Insurance of oppression.

In the conclusion of the 2^d I would con- siderably replace some of the Regulations of St. which are unknown to the C^d regarding Quails & Quailers

I would provide however that at St. all persons committed to prison are bound to support themselves except Afflicted Persons, who are deemed incapable of doing so, all their property being forfeit & indeed it would be inhuman to extend the rule to them. Nov 68. to Nov. 132 12. 16. 683.

By our laws a person committed for any offence is to bear his own expenses up to support of his wife & his estate is subjected, if he has no estate he may be assigned in service. But in Criminal Cases the expense is first paid by the Town or State - and the Town or State may then have an action up^{on} his estate - for the Sh^r is not bound to look^{up} the estate & enter a Judgment to recover the expense. Stat^{ute} 51. 233-365. 6. In all prisoners for crimes agst the State are a charge on State. 51. 230.

The taking of more than lawful fees from the Prisoner subjects the Gaoler to treble damages at the suit of the party & to a fine at the discretion of the C^d. Stat^{ute} 51. 231. 365. Declaration agst for taking illegal fees. Vid. 4 C. 11. 437.

But by the C^d every person committed to prison ^{on a civil suit} is bound to support himself as he can. Yet in England there is a Stat^{ute} called the "Bonds Act" & a similar in St. By which it is provided, that the prisoner committed on Civil Process is to support himself unless he is admitted to the "Poor Prisoner's Oath". This being the only legal evidence of his inability. The amount of the oath is that he has no estate of over \$17.00 value, nor property suff^{icient} to pay the debt on which he is imprisoned, if less than \$17.00 except property,

even that I am & I am. & that he had not committed it away
to defend creditors. He is then to be liberated, unless
the J. J. furnishes a weekly maintenance. See 10 J.
Co. with the Quaker, the amount of which is fixed
justified by the Co. Court. Stat. C. 305. Root 117.

But a person admitted to this with a support
by a creditor is liable afterwards to pay the off
if he had estate at the time or acquires any after-
wards & an alias Exon. or a Scire Facias may be
issued to compel it. Root 58

But when once discharged his body is
not liable to an arrest for the same debt. (as to notice
necessary &c given to the creditor, see Stat.) If on the
Hearing no cause is shown for continuing him in
prison the Bath may be administered by any Mag-
istrate of the County. Stat. 305-6. *Shf. in this case is* Pro L. 654.
entitled to fees, poundage &c & may recover same of Judgt. creditor &c 4th C. 1411.

If the prisoner's application is un-
successful, he cannot make a second application
to a Single Magistrate; but he may obtain a review
of the decision by application to the Chief Justice of
the Co. Court & a Justice of the Peace, or to two Jus-
tices of the Quorum. And if on the contrary
he is discharged on the first application the credi-
tor may apply to the same two Magistrates, who may
order the Maintenance to cease which ends the
matter. 26. Stat.

On this being administered the charge
of the prisoner's support lies on the creditor, but it
is eventually charged on the prisoner, for if the cred-
itor perseveres, the prisoner can never be discharg-
ed to end of time, except on payment of the original
Debt & expences of support &c &c.

Our Stat. further provides, that Debtors and Felons are not to be lodged in the same room. When any County is destitute of a Gaol, any person liable to imprisonment may be confined in the next adjoining County Gaol. Stat. Ch. 366. And this is according to the C. S. that Debtors & Felons shall not be lodged together.

Our respective Co. Courts have authority to order to the Mills all persons committed on Execution for Debt, Damages, Fine or Costs, except where the Execution issued by the Superior Court & then the Sup^r Court has the same authority.

The Ship is bound to obey this order when given, the Prisoner knew an instance & if he does not he is *ipse facto* guilty of an escape voluntarily & therefore liable altho the prisoner be not an actual escapee. This Rule however does not extend to cases where the debt does not exceed \$17.00. Stat. Ch. 365.

Bail

Shos. 2.

An action lies agst the Shf. for taking Guolers.
 insuff. Bail, & it is unnecessary in such action to aver
 that Shf. knew bail insuff. Proceeding of the Shf. agst the
 bail is no waiver of his action agst Shf. 2c Ms. R 100. vid.
 Declaration Sh. ant. 109. contra Corn. D. tit. Bail N. 5-2 Sand
 10ms. Notes 61. 1 Wils. 223-3 Salko. 57- Tidds P. 89- For analogies
 vid. 2 Mbl. 36. & Mod. Int. 215. And the reason given for this
 decision is, that Ministerial Officers are, in genl. for neg-
 ligence or wilful abuse of their office or duty liable to the
 party injured Bull 64. 9- It will readily be perceived, that
 this decision is agst almost every authority in the English
 Books. The process & proceedings in Eng. being widely diff.
 from the U.S. warrant most manifestly the doctrine as above.
 2c Ms. R 100. 9. 403. 4. 5. These last cited pages go to show
 the manner of taking Bail, & ^{when} bail is holden on
 death of principal & when not - what shall excuse
 bail. As to liability of Shf. for tak'g insuff. Bail. vid.
 also 9c Ms. R 479- 11 do. 89- 12 do. 120- 13 do. 107.

A being committed on Edm. at the suit of B. goes beyond the limits of the prison yard, where C. arrests him on a writ & detains him agt his will out of the limits for the purpose of serving process on B. the Shf. before C.'s return - process is served on Shf. & then B. permits C. to return within the limits where he remains. Q: Will this action lie agt Shf. the escape being negligent? Judge Gould says no for no one shall be suffered to take advantage of his own wrongful act. contra if driven beyond limits & detained by persons not Cud. 10th B. 210.

72.

74.

70

III. Statute of Limitations.

By Hon. T. Reeve.

Of the effect of the Statute of Limitations upon Contracts. It is acknowledged by all that many cases have arisen, on which if nothing were taken into cons. but the mere length of time, since which a right of action had accrued, no recovery could be had by reason of the Statute of Limitations. Yet many cases have been decided as not being within those Statutes. We often find in the books this figurative language, that such a case is not within the Statute or that the St. has not run upon it, or that something has taken the case out of the St. What has, or what has not produced this effect so that a recovery may be had in a case by the plaintiff? When no recovery could be had, if length of time since the right of action accrued, was the only thing which governed in the decision, will be the subject of this Chapter: And also to discover the principles which govern in those cases, which are thus circumstanced as to length of time & yet have been held not to be within the Operation of the Statute—

Different opinions as to the governing principle will produce a different result in the final determination of a case, which has been exemplified in various cases where the question has been, whether the case was, or was not within the Statute— I believe, that it is generally admitted, that the Statute of Limitations is enacted not with respect to individual justice, so much, as to general justice— And that they are Statutes which have their foundations in policy, calculated to prevent those mischiefs, which are apt to arise by or among men too long delaying the settlement of their concerns, which increases litigation & that at a period, so far distant from the time of

transaction, that the testimony which would have rendered every thing plain, is lost by the death of wit^s, or forgotten by them if living, & thus opens a door for an unrighteous claim, which never would have been tho^t of, if the concern had been settled at an early period of its existence. Sound policy requires, that men should close their concerns within a certain limited period, or avail themselves of their legal rights within that period, or be barred of each substantiating their claim, either at Law or in Equity.

There is an English St. the substance of which has been enacted by most the States in the Union, on which St. there have been a variety of questions litigated. I have tho^t that a statement of this St. & the variety of questions decided upon it will serve to show you the governing principle, which takes cases out of the St. - If by this means we find there can be no future discordant cases - for let every decision be conformable to that principle & the law on that subject will be uniform. The substance of that Stat^e is "that all Actions founded on Simple Contracts shall be bro^t within six years after the time of the cause of action has accrued: not afterwards."

The points settled are those

1st A promise by the debtor to pay the debt after a lapse of six years will entitle the creditor to a recovery. 2^d The Action is not bro^t upon the new, but upon the original promise. 3^d If the promise be conditional, as "If you can prove your debt, I will pay you" - This entitles the self to a recovery, if he can prove it satisfactorily to the triers. 4th A partial payment of said debt after six years takes the case out of the Stat^e. 5th If this be a joint contract & one thus pay, it takes it out for both. 6th Acknowledgment of the debt after six years, without any thing more said, takes it out of St.

1 Selw. 157.
2 Id. 762.
3 Esp. Cas. 155.
Coop. 540.
2 Id. 340.
Wid. 1001 87.
Doug. 657.
Selw. 126.

7th If a debtor who owes £20. (and at the same time should promise his creditors) should after the Stat. had run upon it, acknowledge that he owes the 20£ & at the same time should promise his creditors, he would pay £10. & no more. The creditor can recover only the £10. 8th 9th When a man directs in his Will that his debts shall be paid - those barred by the Stat. of Limitations must be paid as well as others. Pre. Ch. 386. 9th If an Insolvent debtor, who has been released by the (Stat.) act of the Legislature, having been fortunate in business & a man of honor, should advertise, that he will pay his debts - He is as much bound to pay those barred by the Stat. as any others. Pre. Ch. 385. 10th If a creditor whose debt is barred, petitions apt. his debtor for a commission of Bankruptcy to issue & the debtor, make no objection to the petitioner's claim & the Commission issues it is an acknowledgment that takes it out of that Stat. vid. 86.

It has been contended by some that the principle on which cases are taken out of the Stat. is this, that at C.D. when a great length of time has elapsed from the time of entering into a Contract, to a demand made on that Contract by suit, a presumption arises from there having been no claim made on the Contract, for so long time that it has been satisfied in some way not now known & that in all such cases every thing, that could remove this presumption might be given in evi. As if A. were indebted to B. on a Bond & after a lapse of 20 years, B. institutes a suit on the bond - A. insists that the bond has been paid & relies on the presumption arising from the length of time to prove his plea of payment. (such plea would prevail if nothing more should appear in the case) but B. was able to show, that A. soon after entering into the Contract became insolvent & if the bond had been paid, there was no reason to suppose that any

Stat. of Limitations

vid. post 83.

3 B. 307. n. 11.
2 M. 270.

money could be realized from it; but he had lately be-
 come a man of large fortune & it being equitable,
 that he should pay, as he was able - that was unden-
 ying to collect his just debt - He is also able to show,
 that soon after A. became a man of property he had
 made a considerable paymt. on the bond (say two years
 ago) such proof removes the presumption of payment, & they
 urge that the Stat. has defined the time when this pre-
 sumption shall arise (what was in some degree uncer-
 tain) viz: The length of time suff. to create such a presump-
 tion that the contract was fulfilled is made absolutely certain by
 the Stat. i.e. the length of time mentioned in the Stat. is
 evi. of the fulfilling the contract but it is only presump-
 tive evi. of a fact; that may be removed out of the way.
 If then the promisee can show, when the Stat. of Limita-
 tions is insisted upon, that other facts have existed, that
 remove the presumption, this he may do & thus the Stat. is
 prevented from running on the contract - The foregoing
 hypothesis is not reconcilable with all the authorities. In
 numerous cases where a man makes a will & directs all
 his debts to be paid by his Exor, cannot be founded there-
 on - for in all these cases Chancery directs that the
 debts of the testator, which are barred by the Stat. of
 Limitations, be paid. This Chancery could not do
 if the presumption was that they are already paid;
 there being nothing to remove the presumption out of
 the way, for surely the testator did not direct that debts
 already paid should be paid again - and in such there
 is nothing from which the Chancellor is warranted to
 infer that there are existing debts, which the law pre-
 sumes paid. The testator's contemplated debts & such
 debts as are barred by the Stat. were no longer ex-
 isting debts & of course not directed to be paid. The Chan-
 cellor must under this hypothesis proceed on the ground
 that there were existing debts which the law presumed

did not exist. But this cannot be supposed. If indeed in the Will, the testator had directed his debt of £100. due to A. to be paid & this was barred by the Stat.; here, the presumption which the law is supposed to have raised, is by the will removed out of the way; for the will specifies the debt as one not paid. But nothing of this kind takes place where the testator in his Will directs all his debts to be paid, there is no presumption as in the former case, that the debts barred, were due yet, but directly the contrary, viz: that they were not due. 1 Salk. 154. 20 W. 974. Cowp 540. 2 Vern. 141.

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Upon the same ground it is, that when a man having become insolvent & afterwards acquires property advertises that he will pay his debts, is bound to pay such as are barred by the Stat., as much as those which are not. If the length of time mentioned in the Stat. created a presumption that they were paid & there being nothing to remove that presumption, it would be impossible for such creditors to recover - yet, he will recover & if covered the hypothesis of a presumption that the debt was paid fails.

Thus have I supposed in all cases, if the point can be established, "that a debt exists, the law will raise a promise". As where A promises to pay a debt which he acknowledges he owes B. In this case it is certain that it exists - i.e. the debt - This hypothesis will not accord with all the cases in the Books.

If this was the correct principle on which *Contra* cases are taken out of the Stat. it would follow if A. should acknowledge to B. that he owed him a sum of money, say \$50, but that since it was barred by the Stat. of Limitations, he never would pay any part of it - here is the most conclusive evi. of the debt due to B., yet the law raises no promise, there can be

4 East 590. 1 Selw. 12.

no recovery. So too when A. was indebted to B. & q. as he acknowledged & promised B. that he would pay £5 of the debt & nothing more. B. having obtained the most conclusive evidence that the debt of £9 was due to B. from A. - sued him for the £9 & sailed. But the court observed that had B. sued for the £5 - only he would have recovered that - If this hypothesis was correct, no action could ever be maintained on the original cause of action, before the ev. of the debt exists - yet it is clear that an action was maintainable upon a promise barred by the Stat. & after bringing the action, the debt. promised to pay the debt & ^{of course} recovered. - Here the action must have been brot. on the original cause & not on the new promise, for at the time of bringing the suit, the promise to pay did not exist. 2 Carr 1099.

Judge Reeve apprehends that the principle that governs in all the cases, is this; that whenever we find, that the debt. has received the benefit of the Stat., he shall not avail himself of it & this may be learned, not only from express words. to that purpose, but from ^{own} language & acts, from which it is fairly inferable, that he waived it. If we examine the various decisions at law & in equity, we shall find, that they may all, be accounted for on this ground of waiver. Thus if a debtor makes payment on a Contract - say on a bond or note, after the Stat. has run upon it - it is most apparent, that he waived the Stat. In this, I admit, it might be said, that there was a promise implied from the transaction, that he would pay the sum due on the bond, &c. but it also demonstrates, that he waived his claim to the benefit of the Stat. - & also too, if a debtor acknowledges that he owes the debt & makes no objection to the payment of it, the inference from it, is a fair one that he waives the benefit of the Stat. & also I admit, that he promises to pay it; for the presumption is, that all men are just & honest & will

do that which is right, unless the contrary appears, but if at this time he had acknowledged the debt, but declared he would not pay it, as the Stat. had run upon it, there could be no recovery. Notwithstanding the most conclusive evi. that he was indebted from his own confession, for the presumption of waiver, which arose from the acknowledgment of the debt, is utterly removed by the decree, of the debtor that he does not waive the benefit of the Stat. The principle is also exhibited in the principle of the £9. where debtor said he would pay 5 but no more. This decree he made to the creditor, altho there is evi. that a debt of £9 existed, yet there could not be a recovery of £9, but it seems there might have been of £5. In this case no doubt, the existence of the debt of £9, was suff. cause on which to found a suit for the recovery of the £5. Now nothing can be more apparent, that debtor, by his promise did not waive the benefit of the Stat. as to the £9. therefore there could be no recovery of the £9 & it was as clear that he did waive the benefit of the Stat. as to the £5. & therefore for that sum he could recover.

On this principle likewise we can account for the Decrees in Chancery, where a man in his will directs, that his debt without specifying any particular ones, shall be paid. The Chancellor decrees that the Exor. shall pay debts incurred by the Stat. of Limitations, proceeding upon the ground that there are as much debts, as any debts are, rejecting the idea of a presumption of payment from the length of time mentioned in the Stat. Chancery views such debts, as existing debts from which the Stat. has taken away the remedy by which they might have been recovered. of which Stat. the debtor might avail himself or not, at his pleasure. Therefore when in his Will the debtor directs these to be paid, he has waived all benefit of the Stat. Pre. Ch. 305.6. vid ante 83.

So where a man has been an Insolvent debtor & been discharged from his debts, & advertises that he will pay his debts, he stands upon the same ground, i.e. he must pay those barred by the Stat. - Both Courts of Law & Equity consider debts ~~barred~~ barred - as much debts as those not barred. The Stat. has taken away the remedy from the former but in this case the debtor has waived the benefit of the Stat. *Per Ct. 305. vid ante 83.*

So too, this principle manifestly governed in a case in the 5 Burr. 2630. in which case, the ground on which it proceeded, it made very clear by Lord Mansfield. It was in failing circumstances - B, who held a claim, barred by the Stat., was a petitioning creditor, that a Commission of Bankruptcy, should issue ag^t. A. - A. did not oppose the petition & the commission issued. It was contended, that the commission was void, for that the claim of B. being barred by the Stat. no longer existed. so that no creditor had petitioned, as the law directs. But the Court held it valid; for the debtor, by not opposing the petition, had waived all benefit of the Stat. - that indeed, every remedy was taken away from the creditor, but that the debt remained a debt, & that the debtor might, as he did in this case, waive all benefit of the Stat. & that it did not lie in the mouth of third persons to object to it. 5 Burr 2630 2 Sha. 746. 1 Ld. 407. 2 Bl. C. 702.

So a partial payment on a contract, on which the Stat. has run, takes it out of the Stat. if in such case the debtor waives the benefit of the Stat. When such contract is joint, as when executed by A & B. & C. - & B. after the Stat. has run upon it, without the privity or consent of A, makes a partial payment upon such contract - it has been questioned whether it takes the contract out of the Stat. or not. I conceive, if it does take it out effectually, that A. will be made liable who never waived the benefit of the Stat.; for if A. is not liable there cannot be a recovery ag^t. B. alone - on that contract, notwithstanding he has waived the benefit of the Stat. as a joint contract

1 Selw. 125. Darg. 657. Phil. 2. 22. 6 John. 267.

the Indgt. must be joint according to a case in Douglass, it would turn the contract agt. both. It is difficult to reconcile this doctrine to any established principle. It will not be pretended, I apprehend, that there is an implied contract between joint debtors, that whatever one does respecting the contract is binding on the other - for in other cases where there is no legal obligation to pay a debt & one does it without the privilege or consent of the other, the payee can never compel his fellow debtor to pay him, his proportion of the debt, but if he had consented to the payment, he would have been bound - & I believe there is no presumption in case of a payment by one debtor, that he was authorized by the other to do it. Neither is the case in Ventris 171, reconcilable with the one in Douglass, for it was holden in Ventris, that payment by one, would not revive. Payment by one is doubtless payment by the other joint debtor - but a waiver of the Stat. of Limitations by one, is not a waiver by the other - since no recovery can be had upon such joint contract agt. one, attho he has waived the stat. benefits, arising from the nature of the contract on which there must be a joint Indgt. agt. all, & there cannot be a joint Indgt. agt. all, for all have not waived the benefit of the stat. Now then, is the law to be preserved entire, which subjects the debtor, who has waived the Stat. of Limitations? The true point of light in which to view the subject Judge Reeve apprehends to be as follows - The partial payment implies in it a waiver of the stat. & a promise to pay the residue, the stat. notwithstanding, but this is the waiver & promise of the payor only, and attho it is true, that in ordinary cases, the action is to be brought on the original cause of action, there is nothing to prevent bringing it upon the promise so made if there was a sufficient cause for it, & in this case the original debt, being still an existing debt & a moral obligation resting on the debtor to pay it, it is an abundant cause to render valid the new promise - a suit therefore may be brought & maintained upon

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vide ante 80.

the new promise, setting up the original contract as a cons. for that promise - and this perfectly accords with the opinion of Judge Fredell on the Circuit.

A suit had been brot. (in Ct.) upon a Bond on which the Statute had run; a partial payment after the debt was barred was offered in evi. to take the case out of the Stat. - The Court consisting of Judges Jay, Cushing, & Law, the district Judge were of opinion, that the words of our Stat. were too strong to admit of any evi. to take the case out of the Stat. (Cushing, dissenting.) After this decision an action was brot. upon the promise implied from the payment & the bond set up as a suff. cons. & this action was sustained by Judges Fredell & Law; Fredell at the same time declaring that he was of opinion that the suit on the Bond might have been maintained & the partial payment given in evi. He also supposed the suit might have been maintained upon the new promise & the bond set up as a cons. Subsequent to this decision an action was brot. upon a Bond on which the Stat. had run & a partial payment on the Bond, admitted as evi. to take it out of the Stat. The Court considered the payment as a waiver of the Stat. vid. ante. 3 Bl. 307. n. 11.

Upon the same ground it is, that the Statute of limitations can never be given in evi. under the general issue to show that there is no right of recovery, but if relied on, it must be pleaded; ~~and~~; If it be not pleaded it is a waiver of the Stat. & the Court will not grant a new trial to let in the plea of the Stat. to bar a recovery; for the deft. had waived it, & I Wilson observed that where the deft. had once waived the benefit of the Stat., he never could in any way use it as a defence. Cro. C. 146-7 Mod 105 or 105 - Carth 771 - Sa M 725.

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Simila?

The Mode of Pleading the Stat. of Limitations in this State & several of the other States, as a plea in Bar I apprehend is incorrect. It is in the nature of a plea in Abatement & I apprehend must be so considered in these States, where each has its own Stat. of Limitations. In one State, there may be a Stat. of Limitations, as to one kind of contract & no Stat. in another State, as it respects that contract. As in Ct. no suit can be maintained on Bond after a lapse of 17 years, whilst there is no Stat. of Limitations as to a Bond in N. York. So too the Stat. of one State may require a longer time before recovery is barred on a particular contract than is allowed in another State. As in Ct. 17 years must elapse before there is a bar to a recovery on a note of hand, whilst in N. Y. & N. J. it is barred in six years. To admit the Stat. to have effect as a plea in Bar would in many cases produce manifest injustice. Thus A living in Ct. gives in N. Y. a bond to B for \$100, more than 17 years elapse & B institutes a suit upon the bond in Ct., where no suit can be maintained upon this bond, & in Ct. the suit must be tried, for there A lives, & he avoids going to N. Y. where a recovery would be had upon the bond. Now, suppose that in Ct. the Stat. is plead in Bar & prevails - nothing can be more certain, than that if A had been sued in N. Y. there must have been a recovery, for the defence of the Stat. of Limitations could not have been used there, the defence being local. The merits of the case have not been considered, & A owed the Bond & to say he owed it in N. Y. & did not in Ct. is absurd. The whole defence was, that within the limits of Ct. no suit could be tried on such bond. The plea then is a plea of Abatement, for nothing more ought to be the effect of such a Stat. than that in Ct. no suit can ever be maintained. If after the trial in Ct. A should go to N. Y. & there be sued on this bond, could the Stat. in Ct. be a Bar to B's recovery? It would be strange if it

should have that effect upon a Bond given in N.Y. & in full force there & on which a suit might be brot. there & on which a recovery might be had there, merely because no suit could be maintained upon such bond in Ct. If the merits of the case had been tried in Ct. as to whether the bond had been executed in Ct. by Ct. or if executed, whether it was illegal or had been obtained by duress. In those cases a Judgt. in favour of N.Y. would be effectual, as a pst. for recovery, as if the trial had on the same question had been in N.Y. & there determined in favour of N.Y. So too, if a note is executed in Ct. & sued in N.Y. after a lapse of more than six years, the p^lf. cannot recover, but the merits of the case have not been tried, as no stat. in Ct., where it was given bars a recovery until a lapse of 17 years therefore the note in such case would be valid in Ct. until after a lapse of 17 years. If we view the plea, as a plea in abatement only, then the law preserved entire. The suit abates, because in the Territory where it is brot. no suit can be maintained there & justice is done - as it respects the contract on which ~~the~~ ^{the} ~~law~~ ^{the} ~~loci~~ ^{loci} of one State no suit can be maintained (on such contracts) But which is in full force in an other State, i.e. on which a recovery may be had there at any time. It is justice.

It is manifest that the stat. of Limitations which prevents a recovery, must of necessity be considered a plea of abatement & no more in whatever form it may appear; It ~~must~~ must either be viewed in this point of light, or the other course must be adopted viz: that such bond so given in N.Y. was not affected by our Stat. but that a recovery must be had in our Court in Ct.

So too where a suit is brot. in N.Y. upon a note given in Ct. - after a lapse of six years & before a lapse of 17 Judgt. must be given for the p^lf. disregarding

the Stat. of N.Y. But I apprehend ^{it} is an incorrect idea Stat. of
 for every thing that respect the form of proceedings in Court
 & whatever may & whatever may not be prosecuted there Quintus
 is governed by the lex loci, when the suit is brot. see
 2 Burr. 1099 - Pre. Ch. 366 - Salk. 29 - Cro. El. 140 - 7 Mod. 105 - 3 Wils. 145.
 Birt. 471 - Salk. 405 - 2 Wils. 137 - 1 Ven. 171 - 5 Mod. 426.

But a contrary decision has been given in
 Mass. There it was expressly decided, that the Stat. of Lim-
 itations of the State of New York cannot be pleaded in bar
 of an action commenced in Ms. by an inhabitant of N.Y.
 upon a promissory note, executed there by defts. citizens
 of Ms. 2 Ms. R. 84. And also 1 Wils. 135. 2 Wils. 1.

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IV. Covenant Broken.

By Judge Gould.

This action is founded on a Covenant and claims a remedy for a breach of it. Hence it is called Covenant Broken.

In common language the words Covenant, Contract & Agreement, are often used as synonymous. It is a little remarkable that Powell should have so used them. Pow. C. 244-5-. A Parol covenant, is, in legal language a Solicism.

A Covenant then is an agreement written & sealed & must always be by Deed, but the action on it lies equally whether it be by Indenture or by Deed poll. 5th. Nat. Decs. 346 - Esp. L. 266.

So if the agreement is by Indenture or Deed poll, it is sufficient to maintain this action against the Covenantor, that he alone has sealed it & delivered it to the covenantee tho' the Covenantee himself never signed it. Cro. 212 - Esp. D. 266.

The usual remedy to enforce a covenant is an action at Law for damages, & this is the action I now speak of. Debt will lie in certain cases; as where the covenant is to pay a certain sum. Or a sum, which tho' doubtful may be made certain by a reference to some common standard or measure of value or quantity. Thus a Covenant to give B. two dollars for bushel for all the wheat, which he shall have delivered by the 1st of January. In this case Debt will lie as well as Covenant Broken, for the proportion is given & it is only necessary to ascertain the quantity delivered to render

the same certain. So too if the Covenant were to pay so much as an article is worth in market. "Id certum est quod certum reddi potest."

But if one Covenant to deliver so many loads of wood or wheat &c. Debt will not lie to recover damages, ex nomine - here is no reference to a common standard. Covenant Broken will however always lie in Assumpsit Bull. 167-3 Geo. 429.

But when the Covenant is to do some specific act or something in specie distinct from the payment of money, the most usual & effectual remedy, is by Bill in Chancery for a specific performance, as when one Covenant to convey land &c. *vid. tit. "Powers of Property."* 1 Foub. 27-129-156-1 Bac 526.

But as a genl. Rule, when the compensation for a breach of a Covenant lies in damages only, or in other words, when damages will be an adequate compensation, a Bill in Equity will not lie to enforce the Covenant, for in the first place, when this is the case, relief may be had at Law as well as in Equity & it is a rule both in England & our own Country that when an adequate remedy can be obtained at Law, a Bill in Ch^{ry} will not lie. And again, as a genl. rule, a Court of Equity cannot ascertain damages; both these reasons concur to confine such a case to the jurisdiction of a Court of Law. 10 W. 370-2 Bro. Ch. 341. 1 Foub. 27-129-156.

This rule however is not universal, for where the damages are the adequate, & altho they are the only remedy, yet if the remedy sought is merely consequential or collateral to a ground of relief properly cognizable in a Court of Equity, the Covenant may be thus enforced. Thus when in the language of the rule, matter of fraud is mixed with the damages, i.e. when a question of fraud is introduced with the damages, the Court may be enforced in equity, tho. nothing can be recovered, but damages in such a case. *cf. A. sues B. in God? broken, at law. B. files a Bill in Ch^{ry} alleging that the Court*

was obtained by fraud & prays an injunction. A. may then file a Bill
 a Cross Bill denying the fraud & praying relief. Here, if the fraud is not proved
 is not proved Ch. J. will enforce the Co. Ct. appt. B. for A. has been
 compelled by B. to stay his proceedings in a Court of Law, by a false
 suggestion & it is not reasonable & equitable, that the business should
 be then completed, & debt. should not be permitted thus to turn the
 pty. "around" before he can be relieved. Even in this case howev.
 or neither the Chancellor, or his Officers, can ascertain the dam-
 ages, but an issue at law is directed quantum damnificavit & the
 Chancellor decrees damages according to the verdict. 1 Eq. Cas.
 17-1 Bac. Eq. 526-2 Pao. C. 216.

Of the different kinds of Covenants & how created.

It is the observed, that under this head, there are several coordi-
 nate divisions, and 1st All covenants are divisible in
 to two kinds, viz: Covenants in Deed & Covenants in
 Law. A Co. Ct. in Deed is expressly mentioned & uni-
 ted in the Deed or instrument itself, between the parties. It would
 I think be more proper to call this an express Co. Ct. 4 Co. 80.
 Co. p. Dig. 266.

A Co. Ct. in Law is one that is raised or im-
 plied by law, & for this reason it is implied in Law and
 called a Co. Ct. in Law. This may be called as it prop-
 ly often is an implied Co. Ct. as contradistinguished
 from an express Co. Ct. Thus, A (& B) leases to B. for a term
 of years & from the very fact of the lease, being made, the
 law implies a Co. Ct. on the part of A. that B. shall qui-
 etly enjoy during the term, it being supposed, that there
 is nothing expressly in the lease, limiting A's respon-
 sibility. 1 Lur. 304-2 Co. p. 266.

The specific difference between a Co. Ct. in deed
 & Co. Ct. in Law is this, a Co. Ct. in Deed is founded

upon the words used in the instrument, as amounting to an express C^ont., altho. the words used may not be the most correct, apt, or explicit.

Thus: "I devise to J. S. ^{or} rendering Rent, or Paying, Spickling & Reserving Rent". Those words or any of them amount to an express C^ont. on the part of J. S. to pay Rent. Those words are not the best adapted to express such a C^ont. Still the C^ont. plainly arises out of the language of the parties.

But on the other hand, a C^ont. in Law, or implied C^ont. is not all raised from the language or phraseology of the instrument, but from the nature of the Contract or Agreement, which is expressed: as in the case just mentioned, A. leases with these words, "give, grant, demise" &c. & to farm let" &c. these words imports a C^ont. in Law, that the lessor had a good title, & that lessee shall quietly enjoy during the term - any one of these words of grant has the same effect - And yet it is very obvious that nothing can be more remote or foreign from the language of the Deed. I repeat, that an implied C^ont. is not raised from the terms or phraseology of the Agreement, but from the nature of the Contract or C^ont., & if the lessor proves not to have title, whether the lessee is evicted or not, the lessor is liable to this covenant of seizin. 4 Co. 80^b 5 Co. 17 - Carth. 98 - Roll 517 - 2 Mod 93 - Palm. 388.

Again all C^onts are susceptible of another division, as being either Personal or Real.

A Covenant Real is one, by which one binds himself to pay or assure things Real, as lands, tenements or hereditaments. Thus, if A. make a conveyance to B. in fee & covenant, that he is well seized, or to warrant & defend. These C^onts are Real.

A Personal Covenant, on the contrary, is one, Covt. Broken, which is annexed to the person, or concerns personal property, merely. Thus, if one Covt. to do an act of service for another, here the Covt. is annexed to the person; or, if one Covt. to pay a sum of money, here also, it concerns the personal. In both cases the Covt. is personal. 1 Lush. 139 - 2 Esp. 266 - 294 - 5 Co. 16-17 - Fitz. H. 145-343.

This division of Covenants into personal & real is derived, you perceive from the subject of the covt. as the former division into express & implied was from reference to the nature of the Covt. Covt. or agreement.

With regard to the Structure of Covenants, I would observe, that no set form of words - no technical language is necessary in any case to the formation of any Covt. Any words, showing a concurrence of the parties in an agreement, are suff. to create a Covt. - Any words in short, importing an agreement. 1 Burr. 290 - 1 Roll 518 - 1 Lec. 47 - 1 Wea. 10 - 1 Bae 527.

Thus in the case I mentioned, A. leases B. land, reserving, yielding or reserving such a Rent; here, tho' the words are the language of the lessor, yet they amount to an express Covt. to pay the Rent, for the lessee by accepting the lease makes them ^{his} own. Here are no express or strict words of Covt. as that B. promises, covenants, contracts or agrees to pay Rent. Yet as the intention of the parties is manifest, B. will be liable on Covt. Broken if he does not pay. 2 Sid. 203 - 1 Pow. 6. 241-2 - 1 Fowb 375.

I am aware, that Mr. Powell calls the covt. in the example just mentioned, a "Constructive Covt.", but I trust I have fully shown, in treating of Contracts, that there is no difference between, what Mr. Powell ^{calls} Constructive, & express Contracts, or Covenants. Mr. Williams, the editor

of Saunders Reports calls this an implied cove^t, but this is demonstrably incorrect, for the cove^t of *Impay Rent* is clearly not raised from the nature of the Contract. Thus if the Lease run in these words, "demise, lease" &c the Lessee would not be bound *Impay Rent*. The obligation arises out of the words "rendering, reserving &c" which as plainly express the intention of the parties, as any cove^t that can be supposed. 1 Saund 241 b.

The Subject of a cove^t may be something past present or future. Thus one may cove^t with another that he has done a certain act. E.g. A creditor with his debtor, that he has destroyed a Bond, & if he has not, he is guilty of a breach *eo instanti* that he makes the cove^t. A cove^t of *sciam* is *de presenti*. Thus a lessor or grantor covenants in this manner, "I am well seized", "I have a good title", it respects something present - And lastly a cove^t may respect something future, as any executory contract does. E.g. a cove^t of Warranty & almost any covenants which are personal, as to perform service, pay money &c. Plow. 308.

Covenants in Lease may be restrained or excluded by express covenants, i.e. when from the nature & legal structure of the cove^t, a cove^t in Lease would be raised, an express agreement or cove^t will prevent the implication, according to the maxim *expressum facit cessare tacitum*. Thus if a Lease run by the words, "grant demise" &c the law would imply a covenant of good title in lessor & a "quiet enjoyment" for lessee; but if this were followed by an express cove^t ag^t eviction by lessor, or any person claiming under him, the implied cove^t is then excluded by the express one; and the Covenantor will not be liable, unless the lessee is ousted by the lessor or some one claiming under him. 1 Chlo. 175 - 2 Esp. D. 273 - 4 Co. 80. b. 62 d. b. 675 - 2 Mod. 92.

It has been said, that on an implied covt. raised by a stranger, no action will lie for Breach. ^{from the words "give, grant, demise" &c.} But as this is expressed this already is not law, for the lessor is liable on such covt. if lessee is ousted by higher title. Probably all that is meant, is that if lessor will not be liable for the acts of wrongdoers. He, certainly, is no insurer agt. the unlawful acts of all man kind. *Ord. 214 - 28 p. 260 - not law. 1 Cas. 6.*

I have declared that no particular form of words is necessary for the creation of a covenant. I have further to add, that a clause, ^{in a deed mentioning a prior agreement,} (in a prior) apt., creates in itself a covenant on which an action may be supported. Thus, "whereas it has been agreed, that A. should pay to B. \$100. - I.B. agree to serve A. one year." The deed thus confirms the parol apt. & makes the a covt. on the part of A. *3 Kirby 465 - 1 Geo. 122 - 28 p. 260.*

But as to covenants in deed, if the word "Covenant" is not used, there must be some words, that import an agreement, otherwise no covt. can be created. Thus lessee covenants to repair, provided lessor will furnish timber, or on condition lessor act. Here as the words cannot be construed into words of compact by lessor to furnish timber, it amounts to no more than a condition upon the lessee's covt.

But on the other hand, if the agreement were, that lessee should repair "provided & it is agreed, that the lessor shall furnish the timber"; it is a covt., that binds the lessor, for the words superadded, "it is agreed," transform the condition into a covenant. *1 Roll 510 - 1 Sid. 40 - 28 p. 267 - 2 Com. Digest 560.*

And when a clause in a deed is in the nature of a mere defeasance, it can never amount to a covt. in law. Thus A. covenants to repair, but if the lessor does not furnish timber, this covt. is void. Here lessor evidently is not

bound to furnish the timber.

If a lessor executes a collateral bond, conditioned for the performance of the covenant in a lease or deed of another kind, the obligations extend to implied as well as express covenants. Thus a lease is given in these words, "give, grant, demise, let" here I take as the covenants are twofold, that lessor has good title, & that lessee shall quietly enjoy. At the same time lessor executes a bond, conditioned for the performance of the covenant in the lease; then if lessor has not good title, he is liable on the bond, precisely as ^{he} would have been, had he expressly covenanted, that he had title, & if lessee is evicted, lessor will be as much subjected on the bond, as if he had expressly covenanted that lessee should quietly enjoy, 4 Co. 80. b.

The next subject to be considered, is,

The Construction of Covenants.

On this subject the Rule is, that Covenants are to be expounded liberally & according (egg). i.e. the meaning & intent of the parties is to be sought without such strict adherence to operative & artificial Rules as in case of Deeds or Grants executed, conveying present interest, 1 An. 45. 1 Plow. 140 - 1 Keb. 539 - 1 Hall 419 - 1 Mod 459 -

Therefore in many instances a literal performance will not avail the covenantee, but there must be a substantial performance, or one according to the spirit of the instrument & the general intention of the parties. 1 Rep. 1. A held a bond against B & covenanted to deliver that bond on such a day; before that day he sued B on the bond & recovered. Whereupon he delivered the bond to B. & that before the time appointed for delivery, had expired. & A was held liable on the covenant, for altho the performance was literal, yet it

was not substantial - the covenant being voidable. Co. d. 7. 1 Sid. 40. ^{165.} Co. d. 7. Broken.
Esp. 270 - 11 Jac. 539.

So also, where lessee covenanted to leave, at the determination of the lease, all the Timber on the land, but, at the determination, cut it down & left it on the land; this was very reasonably adjudged a breach. Ray. 464 - 1 H. Bl. 276 - Esp. 271.

So when A covenanted, to deliver a piece of Cloth to B. A first cut & tore it into fragments, or otherwise so impaired it, as to render it unfit for use & then delivered it, at the day appointed. 11 Jac. 429. 242 - Ray. 464 - Esp. 271. This was also held a breach, it being manifestly contrary to the spirit of the Covenant.

So when doct. a Brewer had covenanted to deliver up all the grains that should be thrown out of his Brewery, which he literally performed by delivering them after he had first sowed them with ashes &c. Vid. 16 acut. & 11 Sid. 39-40 - 11 Jac. 429-242. (1 Sid. 151.

But on the other hand what is called a Substantial performance is suff., tho, it be not literal. 1 Leon. 52 - Esp. Dig 270.

Thus where A covenanted with B. that A's son, who was under age should levy such a fine, or, being infra annos nubile, should marry B's daughter before such a day & before the time appointed, the son levied the fine, or married the daughter & the fine was afterwards released or restored for error, or the son when he came of age disagreed to the marriage & thereby avoided it & rendered it null, yet was his previous substantial performance held suff., for both parties must have previously known that the fine was reversible & the marriage voidable, when the son became of age; so that the Court was construed according to their intent, it is presumed.

But where in the construction of a Co. d. the words

are uncertain & the intention of the parties cannot be absolutely ascertained. It is a general rule, that it is to be taken in that sense which is most strong agt. the covenantee & beneficial to the covenantee. And this you will observe is the gen. rule of all constructions of contracts & is not particularly confined to covenants, therefore where the less. covenanted with the lessee, that if he would marry his daughter, he would pay him £20. per ann. without specifying for how long, it was held, that it should be for the life of the lessee. The grantee, & not for one year only, such construction being most beneficial to covenantee & agt. covenantee. *Masker vs Swin. 2 Esp. 271. 1 Bac 539. 1 Sid. 151.*

If one cove. to convey land, to another by such a day & before such a day arriving, conveys it to a third person, the cove. is ipso facto broken & the covenantee is liable immediately, tho' the time stipulated for performance has not arrived.

It is a general rule, that if the covenantee once voluntarily disables himself, to perform a contract, he is considered in law, as having broken it, altho' he be afterwards able to perform it, 5 Co. 21^a 7 Co. 15 - Moor 313-23 1 John 322-6 Bo. 110 - Esp. Digest or Rep. 430.

Thus if A. cove. to day to convey to B. a House three years hence & to purchase it, destroy the house, an action lies immediately agt. him. So if A. cove. to sell a house to B. & before the time, lance him or ride him to death, he is liable from the moment. *Ibid* authorities.

There are some cases in which a clause in form of an exception in a lease amounts to a cove. on the part of the lessee, & others in which it does not. The distinction is this viz: Rule. When the lease is of a given subject, except a certain part, the exception is not a cove., that lessee will not occupy that part, nor disturb lessor in the occupation of it. The lessee is merely as a stranger. If he does occupy or disturb lessor in the occupation of the part excepted, he is liable as a trespasser, but not on the covenant.

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Thus if A. lease to B. a manor or farm "except a particular
close" & B. occupy that close, he is liable to an action of trespass,
but not to Co. broken. Such an exception would be good, how-
ever, to prevent the close from passing to lessee; so that if lessee
should claim it & bring an action to recover it, the exception
in the deed would stop him to make a claim.

But when the exception is of a thing or profit, to issue
or be derived out of the thing demised, it is a Co. that lessee
will not occupy it, nor disturb lessor in his occupation of it.
Thus A. leased to B. land with the exception of a particular right
of Way, or " easement " to his back buildings. Here, as the right of Way,
arises out of the subject of the demise, in the hands of the Lessee,
it is a Co. (the exception is) not to disturb the lessor in his easement.
This secures to the lessor the right of way & land, there is an evident
consistency in construing the exception here as the Co. for
the lessee has an interest in the right of way, or thing issuing
out of the property demised, so that he cannot be liable merely
as a stranger for a trespass, if he disturbs lessor in the enjoyment
of it. It becomes necessary therefore to insure lessor's right, but
in the case above there is no necessity for this, for the lessee hav-
ing no interest in the close, is liable as a trespasser, if he oc-
cupy it. For authorities to these two last rules, see, Co. l. 657. 90.
Com. D. & Waste l. 2. 1 Roll 431. Carth. 232. Salk. 196. Poul. C. 238. 42.
Co. l. 610. 10. Mod. 170. 1. Bac 531.

And I should suppose, that this rule would hold,
whether the exception were to a deed, by indenture or deed
(Roll. 1 Poul. C. 238. 42. Co. l. 657. 90 & 10. auct.)

There is said to be a Difference, between ex-
press & implied, Covenants, in regard to their construction.

The former are construed more strictly than the
latter. The case stated under the title of "Contracts" will serve

To illustrate this rule in one of its branches; You will recollect that if one Cost. to do a thing not in its nature impossible is prevented by some subsequent cause even above human control, still he is liable on the Cost. for non-performance, as was the fact with the London Ship Master who expressly agreed to go to South Carolina in a given time & take in freight, but was prevented by tempest. He was looked upon as an Insurer & held liable for breach of express Cost. 3 Burr 1637 40 - 3 Mo. 259 - 3 East 333. Contra 2 Cr. 40.

But you will observe that I here speak of things, in their nature possible, for it would be otherwise, if the Cost. had been to go a voyage of a 1000 Miles a day, this being not only impossible to him, but to all men & in its very nature, it could never have been the intention of the parties, that he should perform it - Ab. auct.

And where there is an absolute, unqualified Cost. to pay Rent for a given time, for a House & the House is destroyed by Lightning, or any other cause even, tho' above human control, yet is the Covenantee or Lessee liable at all events; for had it been the intention of the parties that he should have been absolved from such liability, the Cost. would have been so qualified. 2 Stra. 763 - 1 Mo. 310 - 700 - 2 Day 1477 - 1 Foub. 366 - Esp. 270 - 3 Day 33 - 3 Dyer 63. 2 Vol. 201. note 11. 6 Mo. 67.

It has been made a mooted question, whether Equity can relieve lessee after such destruction of thing leased, he having covenanted absolutely to pay the Rent. 1 Ch. Cas. 83. There was a decision by Dr. Chancellor Ashley in favour of lessee in 1773. 4 M. & S. 619. In the first case cited there was no decree, but an opinion for relief was given. The subject is discussed in 1 Foub. 366-71-note. Foublaque is a pr^o. relief in Ch. & I confess that I agree with him. His first reason is that a Court of Equity cannot, in hard cases, controul Law, but merely administer relief from its capacity to attend to circumstances, the consequences of which cannot be avoided to in a Court of Law. When

there the ground on which a Court of Equity must proceed
is that the Rule of Law was not framed for such a case - *Broken*
that it cannot remedy by reason of its universality & that
in consequence of that universality, it would be oppressive,
except that it is not the case here. The lawman's usual ad-
vice to the circumstances is Equity for the Rule of Law is
made for this very case; so that there can be no pretence
that any point can be raised in Equity that the law can
not reach.

Mr. Toulmin's second reason is that where the
right of jurisdiction involves Equity & Law appears to be
equal, the latter must prevail.

But further this is a question of mere construction.
What is the intention of the parties? That Lessee should be ex-
empted from payment? If so he would have expressly cov-
enanted thus. In the case supposed the property was his
own too, but it be recollected to use his ^{badger} ~~own~~ as pressions
"The Robbin did in his own hands". Who then should bear
the loss? Can Lessee claim on the ground of morality
that he should be retained? Has not lessor already lost his
proportion in his reversionary interest destruction that
he should lose his debt also? Natural justice then cannot
sanction a relief, & there is no principle whatever to sup-
port Lessee's claim. Equity is already not merely equal
but more than equal in favour of lessor, why then should
it interfere to assist him? Would a relief be repugnant to
the object of Equity? 6 Ch. R. 67.

When we view the subject therefore, with reference to the
intention of the parties (Selwyn 473) or to any principle what-
ever, we find that there is no possible ground for a relief in
favour of a Lessee by a Court of Equity. Yet our first
impressions are generally different.

In the case of an implied covt. however such
accidents will excuse the covenantor. Thus in case of a

a Lease with an implied cove^t of quiet enjoyment. If the subject of the lease is destroyed by lightning, or the public, enemy, or some other cause above human control, here there can be no pretence that lessor is liable to lessee for disturbance in his quiet enjoyment. In this case he would not have been liable indeed, had there been an express cove^t of quiet enjoyment, for it never could have been the parties' ^{intention}, but the example will serve to illustrate the Rule. 3 Burr 1629. 1 Taub. 366. Lang. 259. c And if lessor cov^t to repair yearly without express exceptions & premises are burnt down; he is liable to lessee. 2 Hl. 28. n. 11.

There are many examples in the subject of Bailment, in which, You will recollect, that an implied engagmt. by bail-ee, does not subject him, like an absolute unconditional engag-ment. (arguando.)

2d. Is this rule strictly a diversity in the Nature of 'conditions & Covenants or Contracts?' If so (as I think it is) the reason of the diversity is, that the Law does not imply a Covt. of incertain accidents, tho' the party may make one by express words.

It is a General Rule, That performance of express Covenants is not discharged by any collateral matter, i.e. by common accident, as in the last example, for then tho' the accident deprive lessee of the benefit, that he expected to receive, yet it does not discharge the express Cov.^{ties} on his part to pay the Rent. Rep. 270.

(But then, there are exceptions to this Rule, 1st. If one Court. do do an act which at the time of the Court. made was lawful, but a subsequent Stat. makes it unlawful. In such case the Court. is annulled, for the Deans will never oblige a man to do an act, for the performance of which, it would punish him. 2^d. If a Court. to export, and an Embargo intervenes, The Court. is discharged. Salk. 190-207.

Q. Does this case fall under our Constitution
Art. 1. Chap. 10. prohibiting all Laws impairing the obliga-

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tion of Contract, seems not; The law is not made for the Court
purpose of affecting the Contract. The effect on the Court is Broken.
merely the effect or consequence of a Rule of public policy &
that accidental; vid "Municipal Corp", description 10. If
one Court not to do a thing which is lawful at the time & a
Stat. compels him to do it after, the Court is annulled, so
is the Rule laid down, but the words "lawful at the time"
should make no difference, for the Rule would hold if the
act were unlawful at the time of contracting Lark. 198.
Bull 156-8. Thus, suppose A Court to serve B, one year &
a subsequent Stat. makes it his duty to leave B's service
for the purpose of resisting an Insurrection or Invasion,
he may break the Court to duty.

But if one Court not to do an act, which was not
lawful at the time, a Stat. making that act lawful merely
does not annul the Court; for here the contract & the Stat.
are not inconsistent, & a compliance with one, would be
no violation of the other; whereas, if in the case above, the Court
were to omit an act, which the Stat. requires, a compliance
with the requisitions of the latter is incompatible with the en-
forcement of the former & therefore the Court is annulled. 1 Lark. 190.

It is a General Rule, that covenants, respecting
any particular subject matter are confined in their op-
eration to that which is in being, at the time of making
the Court. Thus: if a Court to lay rate taxes, it extends
only to such as were in being at the time of the execu-
tion of the Court & not to those of another kind impos-
ed afterwards - And if it were (eg., to pay the tax on hearths,
& during the Peace a tax on windows & an additional
one on hearth is imposed, the Court does not extend to
the latter. 1 Des. 60. Wen. 223-3 Lark. 377. Sta 1191.

A Court contrary to Law or good policy is void.

This is a rule applicable to all contracts 4 Burr. 2225 -
25th 17 - Coof. 344-729 - 1 Paup. Cr. 164-76.

If one lease a personal chattel to another in part that the lessee shall have the use of it for a certain time & it becomes useless for want of repair, or is worn out during the term, the Coof. is not broken. The opinions on this subject are however much divided. Sid. 424 - 1 Bac 531 - Ven. 26-44 - Saunders 321. 322, note 4. 323 1/2 note 7.

Altho' Choses in action are not assignable by C. L. as is often said, yet they are often assigned in Reality & such assignment if by Deed to a third person, is an implied Coof. by the assignor, that assignee shall have the benefit of the obligation - that he shall be at liberty to collect it, in the name of the assignor & enjoy it without interruption. For when it is said that a "Chose in action is not assignable at C. L." is meant merely, that assignee shall not sue in his own name: Yet the assignment remaining good as between the parties. If then the assignment is by Deed, the assignment amounts to a Coof. that if assignor release, or collect the money due on it, he shall be liable in Coof. Broken. And if the assignment were without Deed, it amounts to a simple contract of the same effect. Thus I had a Bond of 100 l. & assign it to you. If I release the obligor after this, or prevent your collecting the money due on it, I am liable on the implied Coof. for altho' there are no express words of Coof. by me, yet the words of the grant or assignment are suff. to imply a Coof. 1 Paup. 317 - 25th 125 - Chitty on Bills 109. 2 Ray. 683 - 1242 - 3 Keb. 304 - 2 Vern. 540 - 1 Mod. 113 - 20th 600 - 1 Wb. 24 - 619 - Co. Lit. 214 - Co. Lit. 200 - 2 Mod. 45.

In Ct. the regular practice in such cases is for the assignee to sue the obligor in an action on the case for fraud in paying the original creditor or assignor, or in receiving a release from him after notice of the assignment. & the obligor & assignor are both held liable.

But this is not the case in England, nor in those States of the U.S. Union where a Court of Chancery is established. There can, Broken. then, be no case in which fraud can be brought ag^t the obligor or assignor, but Covt. Broken is the best ag^t the latter & if the assignor were of a simple contract or obligation an action lies on the undertaking.

A Covt. in one deed cannot be pleaded in bar to an action on a Covt. in another deed, unless the former is in the nature of a defeasance or Release. 2 Ven. 217-22. 305- bio. 426- bio. 4. 200- 623- 3 Salk 290- Salk 573-5. Thus (as I shall hereafter have occasion to remark) if the covenantor in one deed give another deed binding himself not to sue the coveantee for one month or year on the former the latter cannot be plead in bar in an action on the former, tho' the party suing may be liable ag^t Covt. Broken on the latter deed.

But a defeasance in a separate deed may be so pleaded. Thus if after a Covt. in one deed by A. to B. for the payment of a certain sum of money, B. executes a separate Covt. in a distinct deed, conditioned, that on the happening of such an event, the former deed shall be void. then on the occurrence of that event should B. sue A. A may plead the latter deed in bar. Salk 573-5- bio. 426- bio. 4. 300- 623- 3 Salk 290.

Hence, also (to recur to the exception first given) a Covt. by a creditor not to sue his debtor for a limited time, is no bar to an action bro^t for the recovery of the debt, but the covenantor by suing within the time, makes himself liable on the Covt. The reason is, that if the Covt. could be pleaded in bar of the action for debt, it must be in effect during that period, a Release of the debt, but if a personal right, as a right of action, be once suspended it is gone forever & is evidently contrary to the intention of the parties.

Rob. 10- 2 Ayl. 10 notes. Earth. 69- Lath. 573. Ray 107- 393- 413-
 2 Paol. 255- 1 Shum. 466- 1 Roll 939- 3 L. 41- 4 Bac 265-
 1 B. & P. 668.

But if such a Co. make a part of the instrument
 (as by a memorandum enclosed, or a clause underwritten)
 it may be so pleaded & does prevent a right of action to recover
 the Debt, until the time expires, tho' on the face of the instrument
 the debt is payable on demand, for the good is, in this case,
 parcel of the same deed, that creates the obligation & the whole
 is construed together; so that the original instrument & the Co.
 in conjunction are construed as a Co. to pay the Debt
 at the expiration of the time appointed. 8 T. 403- 2 S. P. D. 306.
 6 T. 707- 20 Ray. 690- 1 L. 152.

But I observe again, that it is a General Rule, that
 the Co. may be pleaded in bar to another Co. in the
 same Deed, without word of defeazance in the case; for the
 sense is to be collected from the whole deed (as I observed with
 all its parts. H. ant. Moor 699. Thus Lessee covenants to pay
 \$100 p. annum as Rent & Lessor afterward covenants that
 he shall retain \$50. for repairs. Lessee pays \$50. & Lessor
 sues him on the former Co. for the remaining \$50. Lessee
 may plead the latter Co. in bar &c.

The Rule above stated "that a mere Co. not true
 for a limited time is no bar & does not operate as a Release"
 does not apply to any other than personal actions, for a
 temporary suspension of a right to a Realty is not an
 extinguishment of that right, whereas a suspension of a
 personal right is a total release, & as this is contrary
 to the evident intention of both parties, it cannot be
 pleaded in bar. 2 Ayl. 41.

But a Co. never to sue at all is a bar. It oper-
 ates as a Release & may be so pleaded. Cro. 352- 1 T. B.
 446- 8 T. 170- 486- 1 Roll 439.

This Rule is designed to prevent a multiplicity of suits. Co. & produce one & the same effect. For if the creditor were to sue Bickel & recover the debt, he would be compelled by Co. & to refund the whole. The parties want then he in statu quo & there would be the expense of suing, trouble, cost &c. which would only delay justice & injure the parties. To effect this & ultimately the intention of the parties, the Law treats the Co. & as the Release of the debt; This is one instance in which an instrument of one form operates as an instrument of another form. — Term Re. 446.

But a Co. & not to sue at all & never to sue one of two joint & several debtors, is no bar to an action agt. the other, nor, it seems, to an action agt. the Co. & jointly. Tho. a formal release to one is a release to all, yet a Co. & never to sue one, is no release to the other. D. Ray 690. Roll. (i. d. usually cases temporary Roll 1: 170- 8 Mod 68- 171- 11 Mod 254- 12 Mod 551- 10 Mod 72- Kirk 44.

Now if it be asked, "why the Co. & not to sue, is not a Release to the other?" I answer, it is evidently not the intention of the creditor or Co. & not to extinguish his whole claim, for if such had been his intention, he would have co. & nanted to release both, & as he did not, he intend. to hold his claim agt. one. If however he sue the Co. & nante, he may recover his portion of the debt on the Co. &.

If however a creditor Co. & not to sue one of two joint debtors (not joint & several) it is a Co. & not to sue, or a Release of both, & all remedy is thereby abandoned intentionally. This, I believe, is not settled in the books.

Yet if one Co. & with a debtor that he shall not be sued before such a day, & that if he be, he may plead such a grant or acquittance in bar & that the obligation ~~shall~~ shall be void, or that the debt shall be forfeited, it is a condi-

Actual Release, for these are words of defeazance. Carthol. 210.
 Camb. 123 - 1 Shaw. 46. 330 - 50 - Holt 69 - 1 Roll 989 - 4 Mar 266.

A Court. not to sue one in a foreign country is a good bar to an action bro't. in that country, & yet it is merely a local, not a total, absolute release. Thus a Court. by a Dutch seaman, not to sue the Master of a Dutch Ship in England, nor anywhere, but in Holland was held by the Court of C.P. to be a good bar to an action bro't. by the former, the latter in England. The release here was merely local, however, & did not interfere with the right of suing in Holland. 2 Atk. 171 - 603 - 2 Ray 690 - Camb. 139 - 2 Salk 298 - 11 Mod 254.

Now such a Court. as this is allowed by Law, because it is in itself reasonable & consistent with good policy. Suppose two individuals set out from this country to travel over Europe, a Court. of this kind might be necessary, for a suit there at such a distance from friends & resources might be extremely inconvenient & perplexing to the one indebted to the other.

But a Court. by one by which one stipulates to exclude himself from resorting to the proper Courts of Justice in his own country, is void. 2 Atk. 606. For such a Court. is opposed to good policy - it is nothing less than an agreement to renounce the protection of the Law, & the Contractor has no more right to bind himself thus, than he has to bind another to such a renunciation.

And in pursuance of this Rule a mutual & amicable agreement of submission of a claim to Arbitrament is reasonable, but not void, for when the award is once made after such submission, it binds. Such submissions are certainly laudable, yet the Law will not compel an adherer to an agreement to submission to Arbitrament.

for the courts of Justice are the proper places to resort to.

Court
Broken.

In the pursuing this title, it becomes necessary to consider distinctly & before the introduction of Miscellaneous Rules, those Covenants used in Deeds of Conveyance.

In all deeds of conveyance, except what are in the country called "Quit Claims" but more usually "Releases" there are regularly two Covenants either express or implied viz:

1st A Covenant of Seizin, or good title - 2nd A Covenant of Warranty, or in case of a lease, a C^{ov}. of quiet enjoyment" as it is usually called.

The first then is merely a C^{ov}. of title - the second is a C^{ov}. to defend that title. 4 Co. 80^b.

Now in all conveyances, except "quit claims", these two Covenants are either expressed or implied from the words, *dedi, concessi &c.* unless there is some thing else in the deed, to exclude them, or rebut the implication. Roll 519-20. Dyer 257-2 Mod. 92. Esp. D. 266-78.

A C^{ov}. of seizin or good title, is a C^{ov}. de presenti, i.e. an assurance by Conveantor that he is well seized & has the necessary title to make a valid conveyance. Hence if the title be not suff. to make the conveyance - the C^{ov}. is broken, immediately on the making of it. Therefore in a C^{ov}. of seizin, grantee may sue before eviction by the person having better title in order to maintain the action it is suff. for grantee to show that grantor was not lawfully seized. It is not necessary that grantee should allege eviction, or that he has sustained special damages, but merely that Conveantor had not the title which he professed to have. Crof. 170-369. 9 Co. Co. Esp. D. 269. But further, in an action on the C^{ov}. of seizin, it is suff. to aver in the Declaration, that Def^t. was not seized, without stating who was. It was

determined differently in the Sup. Court of Ct. many years ago, but the case, I think is now settled for the averment is suff. to negative the coo^t. that covenantor was well seized. It then becomes incumbent on the defe^r. to show that he was well seized; & in this attempt a prima facie title must be proved by him. The defe^r. must then rebut that prima facie proof of title by showing a higher title in another person. Then if defe^r. cannot substantiate his prima facie title, the suit prevails. 2b. aut.

A Co^t. of seizin is broken not only by a total defect of title, but by an existing incumbrance, unless that incumbrance is excepted in the covenant. Thus a Mortgagee covenant, that he is well seized of the subject of the Mortgage. This co^t. & seizin is broken by the existing incumbrance by Mortgagee. Where a Mortgagee had covenanted that he was well seized, excepting such incumbrance, he would have been safe. 2 Inst 491. 4 John. 10.

In this case, however where the breach of co^t. consists in a mere incumbrance that incumbrance must be specially alleged in the decree, the nature of the incumbrance & the cause of the interruption must be shown. It is not, as in former case when there was a total defect of title, suff. for covenantor to show that covenantor was not well seized, for here the covenantor takes the affirmative & the onus probandi. It is also necessary to allege the facts exactly that the covenantor may have notice of them & be able to traverse the averment precisely. 2 Mass. R. 433-7.

A Co^t. of Warranties or Quiet Enjoyment is, on the other hand, a co^t. de futuro amounting to this, that the covenantor will defend the title, or that the covenantor shall enjoy quietly. On this co^t. then, the lessee cannot

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sue, till evicted & it must not ^{only} appear in the deed, that the eviction was under title, but also, that it was under good & broken elder title. 4 Co. 80^b. 1 Mod. 292. 4 Mb 617. Cro. J. 315. 1 Mb. 3-b. 277. Esp. Dig. 301.

Alleging in the deed, that covenantee was evicted by such an one having lawful right & title is not safe, for this right & title may have existed & been derived from the p^ly. himself & in such case, he could not, certainly, recover. 1 Sid. 466. 2^d Saund. 177. It must appear, then, in the deed, that the evictor had elder & better title than the covenantor conveyed to covenantee. Hence also to assert, that the eviction was by suit is not safe, & indeed much less so than the former overt, for it does not aver any title in the evictor; the recovery might have been had without defence, by collusion or false testimony or by any mistake. bid. b. 917. 4 Co. 80^b. 1 Pow. C. 399. 403. 4-388-9. Chit. C. 328. 9.

However, there is no technical form of words necessary in alleging this elder title in the evictor, but if it appears in the deed, that the covenantee was evicted by a person claiming under elder title, it is safe; the words "elder title" are not technically indispensable. 2 Esp. 37. 4 Mb. 617. 3 Mb. 278. Esp. 302.

Nor is it ever necessary even to state, under what title the eviction was, i.e. the Covenantee is not bound to deduce the title of evictor in his deed as that "he was the heir or devisee of J. D." or that "he was a prior grantee of the same subject from the covenantor". In short he need not show ^{how}, or from whom the evictor derived his title. It is enough to state, generally that he had an elder & better title. 2 Esp. 37. 4 Mb. 614. See however 2 Saund. 177. 1 Sid. 166. where the Court is made to say in the language of the Reporter, that the p^ly. must show under what title, the evictor entered, which is in terms a plain contradiction of the Rule, which I have just laid down. If, however, this language referred to the word in the deed, it will be obvious, that it means nothing more, than that the p^ly. must allege elder & better title in the evictor, which is

reviser the Rule, before laid down. The words in the Decree were "legale jura & privilegia". The Court held these not sufficient, as they clearly were not by the former rules, for the writor might have had title under the *Off.* This I take to be the true construction of the language of the Court in that case, altho' it would apparently imply something else. If, however, it means anything more, it is not *Law*. The reason, why it is necessary to allege this, is because the *Co.* of Warrant, does not extend to the tortious acts of others. Thus if one *Co.* to warrant defend agt. all claims & demands whatsoever, he does not become an insurer agt. the torts & crimes of all mankind, as that would shall not burden the *House* &c.; it extends only to the title, & it is not broken, unless *Coventant* is evicted by one having higher & better title than *Grantor* had. In other cases of injury the *coventant* must take his remedy agt. the wrongdoer. *Str.* 400. 3 *Bl.* 584 - 4 *Bl.* 619 - *Abb.* 34 - *Corp.* 273 - 301.

A *Grantor* may indeed *Co.* expressly agt. the tortious acts of third persons, for any one by his own voluntary act may for safe *Co.* subject himself to any degree of responsibility, even for inevitable accidents. And in such cases an *averm.* of elder & better, or indeed of any title at all is not necessary. *Corp.* 273. 4.

And it has been determined, that a *Co.* to warrant defend agt. the claims & demands of a particular person, extends to tortious & detentions by that person, & this rule is founded on the supposed intention of the parties. *Abb.* 95 - *Co.* 212 - 1 *Roll* 413 - *Str.* 404.

I say this rule is founded on the supposed intention of the parties & it has been rec'd. & handed down, without a question of its correctness. But I conceive, that this construction appears to be questionable, & I should doubt whether the intention of the parties were affected by it. Such a *Co.* appears to me rather a qualification of the general *Co.*, than an extension of it - that the *Warrantor* *Coventant* as to all

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the claims of J.S. & that the Grantor take the risk as to all those
but one, that is he is to be considered as warranting agt the
claims & demands of all persons as well as agt J.S. yet it
seems to me to be straining the construction to say that he war-
rants agt the Port of J.S.

But if the covenantor disturb covenantee, even by
a tortious act under a claim of title, he is liable on his covt.
& pff. need not state, that deft. had any title; if the act stated
in the Decn. appears to be or to have been an assertion of right
(which is what is meant by a tortious act under claim of title) it
is suff. And this rule holds, altho the covt. by the very terms of it
now expressly confined to lawful evictions; for if the Covenantor
were to evict the Covenantee by an act clearly unlawful under
a claim of title, he is liable, as the "locking up a Poss" which
had been decided with such a covt. & stating the fact of "lock-
ing" was held suff. acquit; as that amounted to an assertion
of right; And the reason, why the last rule holds is that the
Covenantor cannot defend himself by alleging, that the act
was unlawful, he being in fact estopped (tho not in a techni-
cal sense) by his Covt. 12th. 671. 10th. R. v. a Shaw. 425. Esq.
Dig. 273-300. 2.

And the Rule is the same, as to all persons included
in the covt. i.e., the Representative of Grantor both real and
personal, as his heirs, Exors & assigns. So that if he does
his Heir at Law were to evict covenantee or disturb him,
altho without title, yet if it were under claim of title he is
liable on the covt. & pff.

Again in the case of Leases, an eviction by
Possor himself suspends the Rent; but a more trespassing
does not for an eviction by lessor is a breach of the covt. that
will prevent his claiming performance on the part of the
lessee. A more entry or trespass does not, however, amount
to a breach. Esq. 243.

And again this rule is the same, when the executor is
 by any person included in the Co^{rt} as *Exec^r*, &c. &c. *2 Burr*,
256, *1 Roll. 221* & *302*. And the rule is the same, tho' the heirs,
Exec^r &c. are not named, in the Co^{rt}. As appears by the same au-
 thorities.

A Covenant by the *Exec^r* as such, for quiet enjoyment
 ag^t all persons whatever, is restrained to themselves, & to persons, claim-
 ing under them. Hence, to subject them to a breach of such Co^{rt}, the
 breach must happen in consequence of some act of the *Exec^r* them-
 selves, i.e. it must be directly, or indirectly their act. Thus a gen-
 eral Co^{rt} dies, the Lien, being a chattel interest, goes to his *Ex-
 ecutors*. Suppose, then, that they make an under Lease cov-
 enanting, as *2 Burr*, for quiet enjoyment ag^t all persons; this Co^{rt}
 cannot be broken, except in consequence of some act of the
Lessor's themselves, i.e. not by the act of any other person or per-
 sons. *Shep. Touch. 163* - *1 & Bl. 34*.

It is a little difficult to be satisfied that the construc-
 tion of a Co^{rt} so broad as it is thus made is according to
 the intention of the parties. There is however a technical reason
 for it, which I do not find in the Books, viz: that the *Exec^r* as he
 covenanting as such, act as Representatives & can be made lia-
 ble only in their Representative capacity, & in that capacity, they
 can be considered only as assuming the testator's rights. If they as-
 sume more than this, they are liable in their private capacity.
 When, therefore, they Co^{rt} as *Exec^r* ag^t the claims of all persons,
 it must be considered as a Co^{rt} to assume nothing more than the
 testator's rights. After all, however it is not certain that such was
 the intention of the parties.

I have now explained to you the difference between
 a Co^{rt} of seisin or Good Title & a Co^{rt} of Warranty or Quiet En-
 joyment with the different actions maintainable on them & on
 what ground.

The Rule of Damages in an action on the Covenants of Seizin & that in an action on the Covenants of Warranty are different, & Et. Rule in case of Warranty is different from the English practice.

In an action on Covenants of Seizin, if plf. prevail, he recovers the cons. money & the Interest. The interest I suppose is to be computed from the time of payment, if the Money were paid for the leased or purchased, or if the money had not been paid, then from the time it drew interest from the Covenantee; 2 Ms. R. 433-55-4. Ms. R. 100-1. Sol. 551 note. 1 Root 100-2. 2 R. 254-4. John. 1-3. 6 John. 49-4. Dallas 115. Bro. 304. Bro. 563.

Since you perceive plf. recovers in common presumption the price of the Land, at the time the Covenants was made & broken, which was so instant, & the Rule of Damages in an action of Seizin is the same here as in England.

In an action on the Covenants of Warranty in England the plf. recovers all his cons. Money, with interest & the costs of suit in which he was evicted, but nothing for improvements or the rise of the Land. This is the Eng. rule obtaining in England & in New York. 3 Leine, 110-4. John. 1-3. 2 c. Ms. R. 455-4. 10. 100. 8 B. 162. 243.

In an action on a Covenant of Warranty in Et. the plf. recovers the value of the Land at the time of eviction together with the damages he has sustained by the eviction, i.e. the Costs of Suit in which the property was recovered from him &c. And such is also the Rule in Mass. 2 Ms. R. 440-3. 546. 543- Kirby. 3.

I confess I think our Rule the correct one according to the principles of Law & Justice. Now in an action on the Covenants of Seizin, plf. recovers the value of the property at the time the Covenants was broken, i.e. at the time it was made. In other words, the cons. which is the damage he suffered in consequence of the breach of that Coven. It would seem, then, from analogy, that in

an action on the covenant of Warranty, the p^{ty}. should also recover the value at the time of the breach, i.e. at the time of the eviction, but any rate, in a country like ours, where the value of land is constantly varying, our Rule is the only one, that will do justice between the parties. But in England & indeed in all other countries, it is not material whether the p^{ty}. recovers according to the value of the lands at the time of making the conveyance or at the eviction for its value seldom varies & when it does, it is but slightly & from accidental causes. But with us the variation is immense & most usually increases in value by an influx of population, rather than deteriorates by constant culture. Surely, then, justice requires, that he, who has increased the value of the property, should recover that improved value as it stands at the time of eviction. This Rule would certainly be best adapted to those parts of the United States, which are but newly settled.

On a c^ort. of seizure the assignee of the covenant (i.e. a subsequent purchaser) cannot maintain an action on the c^ort. ag^t. the original covenantor. Thus A conveys to B, with c^ort. of seizure & then B & C cannot maintain his action on the c^ort. ag^t. A. tho' he conveys to B. for the c^ort. was broken instantly it was made. It then became a chose in action in hands of B. which by the C. & is not assignable. But if C. conveys to A. it would be making the chose in action negotiable. It is contrary to the C. & for C. to sue A. 2 Mr. N. 439 Bull 158-9 - Rep. 295 - 2 John 1 - The same point has been thus decided in Ct. in case of *Tyler vs Tiffany* not reported.

But upon a c^ort. of Warranty, the assignee of covenant can maintain his action ag^t. the original grantor or ag^t. covenantor, if he assigned with warranty. Thus in the case last supposed had the c^ort. been a Warranty C. might have maintained his action ag^t. B. or A. at his election; at any rate, he could ag^t. A. for now the c^ort. is broken in the time of the assignee; there was no right

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of action, until the estate came into his hands; so that there is
no assignment, of a chose in action. C. is the person evicted. 1801.
5 Co. 15^b - 17^a Chitty Pls. 3-11. 1 Ins. 304^b. Shep. 190. Ball 150-9.
3 John 471- 5 Pl. 120.

But an intermediate assignee, who has not been dam-
nified either by eviction, or subjected or sided by a subsequent as-
signee, cannot sue the original grantor, for if he could gran-
tor might be subjected to an indefinite number of actions, for if
one intermediate assignee not damaged might maintain it
another might. 1 Ct. Rep. 244.

In all cases, however, the original covenantor might
I suppose, on principle, recover at least nominal damages, in
an action on the Co^{rt}. of seizin ag^t. the original covenantor,
for a right of action accrued when it was broken, which was the
moment it was made, & this right has not been, for it cannot
be, transferred. But not so on the Co^{rt}. of Warr^{ant}, for that
has gone out of his hands & was not broken in his possession.
The last covenantor or any subsequent purchaser, cannot main-
tain his action ag^t. Covenantor on seizin for reasons already
given. But I take it that the first covenantor may altho his dam-
ages may be nominal, as he has received no actual damage.
There is, however, no such case.

In an action on Co^{rt}. of seizin, the def^t. having ac-
quired title after action bro^t, is no defence, for the covenantor's
right of action was consummated, & when a Co^{rt}. is once broken,
the Law always presumes damages. The subsequent purchase of the
title is but a graft upon the old stock; & I conceive the case would
be the same, if the purchase were made, before the action were
bro^t, but after the Co^{rt}. was made. The Co^{rt}. ~~inures~~ inures to
the benefit of B. by way of estoppel, & B's right of action cannot be
divested, by the mere act of the covenantor; but certainly this
acquisition of title, subsequent to conveyance, would go in mitiga-
tion of damages & perhaps would reduce them to something like nomin-

at damages. 3 John. 49. 40 East 307. 3 B. 106. 2 Linn. 171. John. 16.

If an action of Ejectment is brought against a grantee who is claiming under a higher title, the covenantor or grantor, ought for his own security to notify the covenantor that the latter may appear & defend, if he please. This notification is called when the interest in question is a freehold "Vouching in the Grantor or Covenantor" & when thus vouched, if he does not appear, the covenantor must defend as well as he can. 3 B. 300. This vouching in, you will observe makes the covenantor a party to the Record, which enables him to defend, if he choose. 2 Roll Rep. - Gilb. 201. 202.

I observed, that covenantor ought for his own security to vouch in the grantor; he is, however, under no obligation to do it, & he is as capable of defending the estate as his grantor. But, if the covenantor is not vouched in, he is not concluded by the Judge given against the Defendant, for the question of title is still open & he might prove it in himself, notwithstanding the recovery, but if he is "vouched in", whether he appears or not, he is ~~not~~ concluded by the Judge. Gilb. 201. 202. Yelv. 22 - 1 Mod. 532. 1 Roll Rep. - Lea. 34.

The particular form of giving notice in the English practice, I am not acquainted with, but ours, which I suppose is substantially like it, is by a species of summons, issuing from the Court, called a "Writ of Voucher", giving notice of the existence of the suit & notifying the covenantor to appear if he sees proper & defend.

^{claim}
Quit DEEDS, or as they are now more usually called, Releases, contain neither of these covenants of which I have been treating, for if a deed contain either of these expressly or impliedly, it is not a Quit claim or Release.

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It has been determined in Ct. that the quit claimant may be made liable in an action for deceit for fraudulent representations of his title or the quality of the land. But in a late case (*Solman v. Sherwood*) it was determined, that it would not lie, except in case of a conspiracy to defraud. 2 Day 120.

And in England the Rule is the same in effect, i.e., it is said, that a purchaser of land or other realty, must protect himself, by Co. t. for it is said that every purchaser must resort to the title deeds, for on them only should he rely, or if he wishes insurance as to the title or quality, he must exact in Co. t. & not rely on an action of Deceit for fraudulent representation, as in the case of personal chattels. *Salk. 211. 2 Ray. 110. Bro. 196-386. 3 P. 57.*

It seems, however, that the rule is not fully settled in England, for by *Arggrave* the contrary doctrine is holden, i.e., an action will lie for fraudulent misrepresentation (which the Warranty or Co. t. does not reach, as it never does in Quit Claims, when the seller conceals the instrument or fact, which occasions the defect; or conceals some incumbrance to which the estate is subject, 1 *Lus. 304^a* note. So in *Cumies' Dig. 1438- Chap. 5- Sec. 57. 1 Taub. 366.* So also in *Cumies' Dig. 1438.* These authorities tend to show, that an action on the case in the nature of an action for Deceit may be maintained in such cases.

During the rage for Land speculation in our Country, much fraud of this species was practiced. Sellers would assert title when they had none, & to induce purchasers to take deeds, would make many fraudulent misrepresentations as to the nature & situation of the Land. They drew Maps & Plans of Plantations & Mill Seats, that never existed, carefully, however, avoiding contracts, that would subject them.

Admitting that the English rule is correct, I am inclined to think, that such an action ought to be maintainable here. In England a man may avoid deceit of this kind; but the recesses of our forests cannot be explored by every purchaser;

The means of information are so limited, & the opportunities of defrauding, so numerous, that in my opinion good policy requires, that such actions should be supported. Mild, uncultivated lands are continually in the market, & it appears to me, that such sales should lay the foundation for an action for frauds, as well as sales of any other kind of property. The situation of England is obviously different in this respect, & the rule, therefore need not be the same.

There is another species of Covenants that requires a distinct case. viz: Covenants to pay money by installments. On a Bond conditioned for the payment of an aggregate sum of money by installments, Debt lies upon a breach on the non payment of the first installment, & the plf. recovers the whole pecuniarily. 1 Atk. 410. 11 Mod. 80. Stra 515-514. Cro. J. 538. Esp 205. Lord Coke lays down a rule directly contrary, in 1 Inst. 47^b. 292^b 10 Co. 28^b. or 128^b. - Where however the word is there used it is to be understood as referring to a single Bill. 1 Atk. 548^b. Esp 205. Bull. 160.

Indeed the very structure of the Bond shows the rule to be correct as I have stated it. The Bond runs thus "I, A.B. acknowledge myself bound to C.D. &c. in the penal sum of \$1000 &c, here is an absolute debt payable instantaneously; in the condition it is provided, "that if A.B. shall pay to C.D. \$100 at the end of one year, \$200 at the end of two &c. then this bond is void &c" Under no other condition than payment according to these terms, can the obligation be discharged. If then A.B. do not pay then the penalty is forfeited & this is the ground & this is the ground on which an action of Debt lies for the first installment.

But with regard to a single Bill the rule is different, for upon that, Debt, which is the appropriate action, will not lie, till all the installments have become payable. 10 All. 601-1 Inst. 47-292^b 10 Co. 20-Esp 205. Thus, I, A.B. acknowledge myself indebted to C.D. in the sum of \$1000 to be paid thus: \$100 in one

year &c. for ten successive years. Here the aggregate Debt of \$1000 Co. is entire & indivisible & there cannot be ten actions of Debt on this Broken Contract. The agreement is to pay \$1000 & there is no condition annexed to accelerate the payment or to create a forfeiture of it. If there were, it would of course come within the first rule as to penal bonds.

By our Stat. respecting suits on Penal Bonds, condition for the payment of a Debt at several times or by installments, the Courts of Law are allowed to Chancet the penalty, so that plf. recovers only his actual damages. Thus if p. sue for first installment, he recovers that but that only. He may then bring Scire Facias on that Judgment & have execution, for the other installments, as they become payable. This however is a mere Statutory regulation & is contrary to C. & G. Stat. Ch. 35. 6.

But on the other hand if Rent is reserved at so much for annum payable however by quarterly installments, an action lies for each successive payment, i.e. at the end of each quarter. Now it may be asked what constitutes the difference between payment of Rents by installments, & of a single Bill in the same manner? The aggregate payment of a particular sum is to be completed the end of each year.

The difference is this, the aggregate sum constitutes an entire indivisible Debt, as before explained, but Rent is considered as part of the reservation of the issues of the Land, which shall have accrued at the day appointed for payment. The Year is merely a measure, furnishing a rate or proportion, but the principal difference is, that the quarterly reservations are in the nature of distinct Debts, & do not altogether constitute one entire debt, as in the case of a single Bill. Indeed if Rent payable quarterly could not be collected, when due, that which is payable yearly, for a term of years, could not be collected yearly, but the whole must be collected at once, at the end of the year, which would be extremely inconvenient & oppressive. 3 Co. 29. 10. Co. 120.

On a Coat. or Note for the payment of an aggregate sum by installments, an action of Coat. Broken or Assumpsit will lie when the first installment becomes due & so tolies quoties. But on the contrary Debt on the Coat. or Note will not lie until the last installment becomes due. Coat. 175-77. 867- Co. 185- 2 Co. 22 & 4 Co. 44 & Co. 183. Salk. 145. Bull 166- 1 T. 547 Contra the first branch of the Rule: Co. 110.

The Rule, you perceive, is diff. as to a Debt on a Penal Bond or Single Bill, & a Coat. or Note. On this subject there is a great deal of confusion in the Books, arising from the use of improper language. There appears to be no discrimination between bonds & single bills, or between Coat. Notes & Single Bills, nor any precise Rule of damages.

To repeat the Rule then, On a Penal Bond conditioned for the payment of an aggregate sum by installments, Debt will lie on failure of payment of first installment & the whole sum will be recovered. On a Single Bill, Debt will not lie, until all the installments have become payable. On a Coat. or Note, an action of Coat. Broken or Assumpsit will lie, when the first installment becomes payable & so tolies quoties. The plaintiff recovering in each action what is due at the time; but Debt will not lie, until all become payable.

The difference in these cases arises from the form of the actions & their diff. provinces. Coat. Broken or Assumpsit is brought to recover damages, or the Loss actually sustained & more, But Debt lies to recover a sum certain in money. Coat. Broken or Assumpsit will lie for recovery of the first payment, but Debt will not lie, but for the recovery of the whole debt, i.e. not until all the installments are due. Unless indeed in the case of a Penal Bond, when Debt lies on failure to pay the first installment & the whole is recovered (Perhaps the distinction would be more clear & easy if the action of Debt on penal bond were described, as an action for the recovery of the penalty of the Bond, which became forfeited on the failure of payment.)

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If there is a Co^{rt}. or note to pay several sums at diff^t times, there being no aggregate in the case, it is clear that an action of Co^{rt}. Broken will lie, & so Tolies quotes. And I conceive, that debt will lie for each successive payment tho' I know of no such determination. Thus I covenant to pay B. \$100, on the 1st of Jan'y 1818 - & \$100, on the 1st of Jan'y 1819, &c. Now there are not properly in statement of the same debt, there is no aggregate stated - They are in the nature of six fact distinct debts - That Co^{rt}. Broken would lie, appears clearly from the former Rules, vid Bull 160 - Co^{rt}. 770 - 807 - 110 - 111 Bl. 550 - 1 Lush. 292 &c.

There being no aggregate in the case, it can make no difference, whether the obligations to pay these several sums are in one installment or in two or ten. The difference between the two cases is, that there is not as in the former an aggregate debt divided up into several payments, each one constituting a distinct debt - Indeed, the case is precisely like that in which I covenant to pay B. an annuity of \$100, on each 1st of Jan'y, i.e. to allow for 2 or 10 years. Each debt lies for each payment as it becomes due, but for this opinion I have no authority.

A clause in a Co^{rt}. that on nonpayment of any installment, the whole debt shall immediately become payable, is good. E.g. A Co^{rt}. to pay \$1000 in 10 diff^t installments, with an express stipulation, that if covenantor fail to pay the first, or any subsequent installment, at the time appointed, the whole sum shall immediately become payable. Chitty, Bills 212-13. In Br. Jus. this appears to be a diff^t opinion expressed, but the Rule I conceive to be correct.

Omitted. In Ct. any number of breaches may be assigned - either, at Co^{rt}. on Bonds, for one is a forfeiture of the whole & Com 36-4 Bore 131-45 - 2 Nov. 190 - 1 Roll 112 - Comb. 297 - 2 Wils. 293 - 3 Salk. 108. vid Pleas & Arg. —

And now by Stat. of 5 & 6. W. 3. p. 11. may assign some
my transfer as he himself is entitled on Bonds for the perform-
ance of covenants &c therein. 1 Burr 344. 2 Wils 377. 8 Wils 106
Q.B. 2 407-111-12 - 2 Burr 890. 3 Wils 459-462 - Casp 407.

I am now to treat of the Rights & Liabilities of the
Representatives in this action, i.e. representatives of the origin-
al parties.

In the language of the Co. the personal representatives
of the covenantor, i.e. his Ex^{rs} & Adm^{rs} are implied in himself
for they are bound as a matter of course & without being na-
med by those covenants by which he himself is bound. This
by the way, is only a general rule & is not universal. Moll 519-
Dyer 14th 2 Wils 197. 1 Pars. 6. 170.

I observed, that this rule is not universal. There is an
exception to it where the Contract is fiduciary - as where it is
founded in personal confidence reposed in the covenantor
or the party contracting. Thus a Master is bound by Co. to
instruct his apprentice, yet his Ex^{rs} or Adm^{rs} is not, for the Co.
was fiduciary, confidence being reposed in the master, who
supposed capable of instructing - ^{See} ~~See~~ ^{as to this} Ex^{rs} &c a per-
sonal representative upon the responsibility does not do so;
yet it is generally true that personal representatives are bound.
Poliz. l. 553 - 1 Sid 216 - Com. d. Tit Co. C. 1. 2 Mod 299

But the personal representative would be liable, even in
the last case, i.e. where the Co. was fiduciary, if the Co. was
broken in the life time of the covenantor, for a right of action
accrues agst him in his life time, & is a claim on his person-
al fund, which goes into the hands of his Ex^{rs} or administrator.
Com. d. Tit Co. C. 1.

And an ancestor or any person seized in fee may
bind his heir at Law, by a Co. Thus A. having covenan-
ted to convey real estate at a given time, dies before the time;

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his heir may be compelled in Chancery to make a conveyance Co. l.
of the good money will in general go to the Executor. Dyer 332. Broken.
2 Vern. 213.

Indeed it is a general rule, that covenants real bind
the heir of the covenantor: & on the other hand, descend to the heir
of the covenantee; as in the last case, if covenantee had died he
fore performance his heir might have compelled performance.
This Rule is of very extensive application. Bull 158. Moll 22.
Fitzher. N.B. 343. 2d 294.

And the heir of the covenantee may sue on a Co. l. Real
tho not named, provided the Co. l. runs with the land, & appears
designed to continue after, & is actually broken after covenantee's
death. (I shall explain hereafter what is meant by "Co. l. running with
the Land.")

Thus if I lease Co. l. with Leasee to leave the lands
& tenaments in repair & Covenantee dies before the expiration
of the Lease, the heir of covenantee may recover of Leasee, if
the tenaments are not left in repair, for the breach of Co. l. took
place after the death of covenantee; yet the term had not then
expired & did not till the land descended to the heir of covenantee.
The Leasee or covenantee then had sustained no injury: therefore the
action belongs to the heir, & not to the Co. l. as Sid. 2 G. 2. 92.
Skind. 305. 2d 294-5.

Some of the distinctions are artificial but are impor-
tant & should be well understood.

Again then Co. l. Co. l. with B. & Co. his heir for
quiet enjoyment in a lease, & the Co. l. be broken in the life-
time of the covenantee, the Co. l. or Leasee. If covenantee &
not the heir is entitled to the action at his death & this, whether
the heir was, or was not named in the Co. l.

What, then, is the distinction, between this & the former
case? The only injury in the preceding case was to the heir -
therefore the right of action was his, but here the damage oc-
curred in the covenantee's lifetime. The right, here then, was
the covenantee's & had he exercised that right the money would

and would have gone into his personal fund, & there-
fore to his personal representative, not to the heir. 2 D. & W.
1 Hen. 4th 347. Bull 135 - 2 Rep. 245. & as to the other branch of
the Rule whether the action belongs to the heir. vid. Inst. 141 -
2 D. & W.

Again if upon a cove. of Warranty as it is in
English termed in Cove. of quiet enjoyment, the Heir at
law, sues after the death of the cove. the Heir has a right
of action for the Cove. "It runs with the land" & descends
to him. This you observe, comes under the first branch of
the distinction above taken. He. Rec.

The Rule that Covenants for Personal representation
are always liable for breach of Cove. during life of cove-
nantor, holds, even, when the Cove. is Real. Thus, sup-
pose it, cove. to D. with Cove. of Seizin, & say this Cove.
is broken constantly it was made, if broken at all, you
will recollect, that a Cove. of Seizin, when broken
at all must always be regarded as broken during the cove-
nantor's life, or at the moment he executed the deed.
The claim then is on his personal fund. therefore
on his Cove. or Representative who commands it.

And the action will lie agst. the Cove. or Personal
Rep. though the Cove. is Real & tho' it is not broken till after
covenantor's death, if the Cove. is express, but not other-
wise. For the first General Rule is, that the personal rep-
resentation is implied in himself & bound by all the cove-
nants upon which the deceased was bound. There was
a priority of Contract, extending to the personal representa-
tive. 1 Roll 519 - Com. D. 1st Cove. C. 1 - C. D. 553 - 1 Pow. C.
120 - 2 P. W. 197.

But on the contrary in a Cove. in Land, i.e. an
implied Cove. in a Deed or Conveyance, the Cove. is not

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liable, when it is broken after. Covenantor's death. If. Quia *Coop.*
implied covt. arising from the words "give, grant, demise *Coop.*
&c.", he is not liable, though an express covt. he would
be, for in the last case, there is a privity of contract extend-
ing to his Representative. Second, in the former or implied covt.
The right of recovery, says Mr. Gault, is founded on a privity of es-
tate - but the Rep^t. has none; the Reversion descends to
the Heir at Law. It follows, then, that the covt. is not liable, for the
right of action follows the estate. 1 Co. 157 - 1 Bac. 533 - 240. 157.

If an Covt. or c^{ld}. comes into possession of a
House or Land for Years in his Rep^t. capacity, he may be con-
sidered as an assignee of the term & may be sued as such. He
may be described in the Decree as such, for he is virtually an as-
signee by operation of Law, but one assigns to another, he
becomes assignee by act of the parties. The assignee, or Covt.
here is liable for breaches accruing during his continuance
in possⁿ. on the ground of privity of estate. 1 Wil. 4 - 1 Sal. 6.
309. Esp. 296.

Having considered the right of the Heir of the cov-
enantor, let us next advert to the liability of the Heir of covt^{or}.
The General Rule here is, that if the Heir is named in the covt.
& has real assets by descent, he is liable for breaches of covt. either
or before or after Covenantor's death to the extent of those assets.
But if he is named in the covt. & has not assets, he is not lia-
ble. Thus suppose A. making a covenant for himself, & heirs,
the covt. is broken, the Heir is bound by the extent of the as-
sets he has, but no farther. 1 Hob. 357 - 1 Jus. 365 - 50 - 84. 2 Bl.
370. Esp. 294.

In all actions ag^t. the Heir at Law, I mention this
here, tho' it is a rule of practice only, on a covt. of his an-
cestor, the inquest of the Heir at Law is no bar, for he is sued
on no covt. of his own, but by reason of the funds in his
hands; he is not personally liable; the property only is liable.

his infancy could be plead only to prove his incapacity to contract, but it must be proved that he did contract a sale. See Co. v. v. was the act of his ancestor, who conveyed sui juris. 4 T. B. 77.

At Co. v. the heir at law, as such, if named in the Co. & having assets by descent, is liable at law on his ancestor's Co. v. of seizure. The heir is certainly bound at Co. v. & co-venturer may sue him or the personal representative at his election.

But in these States, the Statutory regulations have materially altered the system of law as it regards the heir. And the Stat. is in those States where such Stat. exist, point out the *quomodo*. It is done here under the order of the Judge of Probate. And if the heir is made liable, it deranges the whole system. I admit, that at Co. v. the heir is liable & that it makes no difference, whether the breach happened before or after the death of the co-venturer; but in those States where a Stat. makes the personal rep. liable &c. he having the entire control of deceased funds, the heir, in this case, cannot be liable.

With regard to a breach of Co. v. of Warranty, happening after the death of the co-venturer, no doubt the heir is liable in Co. v. as at Co. v. & Stat. makes it the ecclesiastical duty of the Co. v. to satisfy all outstanding claims agt. the deceased. & therefore, reimb. all Co. v. of seizure. See also a Co. v. of Warranty.

Thus much with regard to the Rights & Liabilities of the Representatives of the original parties to a Co. v.

Of Covenants that are used in Conveyances, some are said, to "run with the land", i.e. to follow the Interest wherever it goes & others are denominated collateral. Now a Co. v. is said to "run with the land", as I understand it, when the obligation created by it passes upon an assignee of interest,

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so as to decalve upon & bind the assignee - or in other words, ^{Coar}
it passes as the Fille passes. In fact, it accomplishes the Fille ^{Provis.}
& therefore binds the parties. On the other hand; those Coar.
which do not pass with the Land or subject matter of the convey-
ance, i.e. "don't run with the land" are called Collateral,
and out of this distinction a diversity arises as to the liability
of assignees on the Coar. used in Conveyances.

On this subject the first General Rule is, that the as-
signee of a Lease is liable for breaches during his possession, tho'
not named in the Coar. provided it runs with the Land.

But on the other hand, the assignee on a collateral
Coar. if not named is not bound. 1 Houlb. 348.

The inquiry, then, arises, in what cases does the Coar.
follow or "run with the land"? For as the liability of the assignee
depends on this & indeed as the liability of the different par-
ties in a variety of cases depends on this, it is essentially
necessary to understand it.

When the thing covenanted to be done, or concern-
ing which something was to be done, was in esse at the time
of making the Lease, the Coar. does run with the land,
& therefore the assignee or Lessee is liable for breaches during
his poss'n. Thus suppose on a Lease of an House, the Les-
see cove. to rebuild, the Coar. runs with the land & the
rule is the same whether the building were alone demised
or on the land with it. Here, you see, it runs with the land
for it concerns a subject matter which was in esse at the
time of making the Lease. Therefore, the Covenantor's Ex-
ecutor is liable for any breach &c. 1 Roll 521. Brod. 457. 5 Co.
166. 24 ^{ass.} 11 Co. 80.

So also a Coar. by Lessee to pay Rent, is said to
"run with Land," for tho' the Rent itself is not actually in
esse, yet it is potentially so, in legal language, because
the land or subject matter out of which it is to issue, is actu-
ally in esse. Hence if an assignor has made the assignee is liable on Coar.

whether not named, for the coo^t runs with the Land. 10th. 303.
Hood 357. Bull. 159.

But on the other hand, if the thing concerned to be done or concerning which something is to be done, was not in esse, or had not the thing or subject leased or demised, the coo^t is collateral. Therefore, according to the first distinction, the assignee is not bound by the lease, unless named, nor is he liable in some cases even if he were named. By "his name" is not meant his proper name, you will observe; it is said to name him "the assignee". Thus, suppose A. Leases to B. Leases. B. covenants to build a house de novo, & in the interim assigns to C. who is not named in the coo^t. C. is not liable there, for the coo^t is collateral & did not run with the land. The House was to be built de novo - it was not in esse at the time of coo^t made; but was to be created afterwards. 5 Co. 16. 2 Bull. 127. 3 T. R. 393. 6 R. 6. 552. Mac 534.

To observe this distinction between this & the last case, it will be necessary the somewhat repetitions. If the coo^t is to pay (rent by Leases) the assignee is bound by that coo^t. If the coo^t is to repair a building, the assignee is liable for the same reason - that the subject matter was actually in esse, or potentially so, i.e. issuing out of what was in esse; but when coo^t was to build a house de novo, assignee is not liable, it being a distinct collateral coo^t, which does not follow the Interest.

But on the contrary, a coo^t which goes to the support or preservation of the thing demised is said to run with the Land and therefore binds the assignee & the interest, the not named. By this description is a coo^t to repair. Leases, to build de novo. So also if Leases coo^t to leave so many acres of a Farm untilled or unploughed, this runs with the land, for as Farmers say, "it keeps the Land" & goes to the support or preservation of it. Therefore this coo^t passes with the title. If then the assignee plough those acres, he injures the quality of the land & is liable. 3 Leases.

C. 17-10
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In laying down the first two general Rules on the subject I observed that 1st The Assignee of a Lease is liable for breaches during his possession whether named or not, provided the Court runs with the Lands: 2^{ndly} But that on a Collateral Court, if not named, he is not bound for such breaches. Again

It is a 3rd Rule, that, if the assignee are named in the Court the Assignees are bound in General, whether the Court runs with the land or not. 5 Co. 16^b 1 Bac 534. Thus A having leased to B. B. Court to build a Wall & assign to C. If C. holds before the time fixed for performance has expired & does not build, he is liable, for covenants made for himself & assignee. Assignee, then, is bound by those covenants, which concern the demise. So if the Court had been to plant a Grove on an Orchard &c.

But the Court think the assignee must be a thing, which relates to the thing demised, or subject matter of the Lease, otherwise the assignee is not bound, tho' named. In other words, he is not bound to do any thing, foreign to the thing demised. Thus if B. a lessee Court to build a Wall on the land adjoining (on the land adjoining) that which he afterwards assigns, or to Ditch other lands &c. and then assigns to C. C. is not bound to perform, for this has no concern with the subject of the demise or lease. So if the Court were to pay a collateral sum - a sum distinct from the Rent or in Gross. 5 Co. 16^b Bro. J. 438- 1 Foul. 352.

The reason why the assignee is not bound in this case is, that he is in no priority, but that of estate. Priority of Contract does not bind him. He, who takes the assignment from the Original lessee, is not bound by the contract which is to do an act, concerning a subject not contained in the Lease himself, & in which he alone has an interest. The Court being relative to another piece of land not

contained in the demise, is nothing to him, and as regards that land, there is no priority of estate between himself & lessor, & nothing but priority of estate can bind him. Such an agreement as to him is another deed & is totally foreign to that interest by virtue of which, the assignee is bound.

But when the assignee is bound according to these distinctions, he is liable only for such breaches as accrued during his possession, or the continuance of his title. If a breach of covenants occurs before assignment, the assignee is not liable, the covenants with the land, & that he is named, resort must be had to the lessor. For at the time of breach, assignee had no priority of estate. Thus, suppose A. lease D.B. for 20 years, he covenants to build a house within 10 yrs. & then assigns to C. C. is not liable for what accrued before he had interest. *West 575 - Holt's Cas. 177 - Salk 199 - 3 Burr. 1271 - 2 D. Ray 388 - 1 Taunt. 356 - Doug 443.*

The obligation of assignee is bounded on priority of estate & he is bound, because he takes the interest to which the covenants are attached, of course, his liability can be co-extensive only with his interest & cannot commence before, nor continue after that interest. Hence if lessee covenants to build a house within 10 yrs. the time having expired & the covenants not being performed, if he assigns, the assignee is not liable, tho' named, for the breach occurred & the right of action was complete before the assignee commenced. *Ab. Auct.*

Again an assignee is not liable for breaches which accrue after he has assigned or transferred his interest to a subsequent assignee; & so far is this rule carried, that if he assigns the very day before Rent is due, he is liable for no part of the Rent. *Barth. 177 - Doug 735 - 3 Co. 22 - 1 Salk. 81 or 31 - Pow. Mod. 90 - Bull 159 - 4 Mod 71.*

The reason, is that part of the Rent is due on Oct.
 til pay day arrives: the whole aggregate ^{amount} (reservation) accrues
 on that day & not the minutest fraction is due before. This rule
 however does not affect the lessee, for he is liable on his ex-
 press coven. To pay Rent if it is not paid by assignee at any
 distance of time.

The Rule that the assignor is not liable for any
 part of the Rent accruing after assignment. To a subsequent as-
 signee" is so strict & has been so rigidly construed, that he
 is not liable at Law, altho' he assigns to an Insolvent, & ac-
 cording to some opinions, altho' done for the purpose of de-
 frauding the assignee; tho' on principle it appears to me un-
 doubted, that if he assigns to a beggar, by a sham conveyance
 he would still be considered as the Tenant & subjected at Law.
 The weight of authority is ag^t. this. Amb. 405. Stra. 122. 11 Bl.
 72. 166. 13 Bl. 29. See Contra that an assignment by fraud
 will not protect assignor. 1 Hen 329. 31. By this authority
 fraud may be replied & the replication would be good. That he is not
 guilty of fraud if he assigns to a beggar vid 2 Bl. 327 note 15.

It seems however to be questionable Law, unless
 indeed, there were a continuance of possⁿ after sham
 conveyance.

And if assignee should assign to a feme covert
 who cannot bind herself to the payment of Rent. The Rule is pre-
 cisely the same. Doug 435. & 485.

Now the reason of this has in effect, been given al-
 ready. That the assignee is liable only by virtue of estate & not by
 contract. This is the principle of the Rule, what if assignee
 assign over before his liability or a right of recovery accrues
 ag^t him. he is not liable for any part. It appears howev-
 er, that Equity will relieve ag^t him & compel assignee
 to account for the Rent during the time that he occupied,
 or pro rata if the subsequent assignee is Insolvent. 1 Foub.
 351. 3. 11 Hen 87. & 165.

Whether a Court of Equity under any circumstances can restrain an assignee by an injunction from assigning to a 3^d person with an intent to defraud, has been a mooted Question. I should not think it could. Whether the assignee shall after assignment be subjected is another question. But it seems the going very far for any Court to say, that they will prevent his assignment, because it might be injurious to a third person. 2 Atk. 219 1 Houb. 351.

If an assignee is evicted of part of the premises or subject demised, he may be compelled to pay (at Law) for the residue of which he remains in possession & for this his share the Rent is proportionable. Thus A leases 100 acres of land & B is evicted of 40; for the remaining 60 acres of which he continues in possession, he may be compelled to pay Rent. 2 East 375. May then it may be asked, is he not compelled, when he has continued in possession for 11 months & has then assigned, to pay $\frac{11}{12}$ of the Rent? For a reason already given; The whole Rent accrues only on the day of payment, but in the case of a partial eviction, it is diff: for he continues in possession of that part, from which he was not evicted, till the day of payment arrives. Therefore the Rent is, in this case, apportionable in a Court of Law.

So also if the original lessee is evicted of a part of the land leased - as 50 acres out of 100 - he may be compelled in an action of Debt, for to pay Rent for the part of which he was not evicted, but not in Court Broken. 3 Co. 22 a. 2 East 575.

The reason for this diversity is, that Debt for Rent when brot. agt. either lessee or assignee by any party, is founded on a privity of estate, which continues as to the 50 acres in the case above. Hence, he may be compelled to pay in that action. But Covenant Broken is founded on privity of Contract merely & an entire claim founded on a per-

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sonal coo^t is not divisible, therefore, such an action would not lie. In Debt he may recover pro tanto, i.e. for so much Rent as is in the same ratio to the stipulated Rent, that the estate continuing in Lessee, bears to the estate demised.

It was formerly doubted, whether a coo^t by Lessee not to assign his interest, to another was binding in Law & this doubt was founded on another, whether such an assignment was not repugnant to the nature & incidents of such an estate. It is now settled, that it is binding, & indeed if the coo^t is properly framed, for the purpose the estate will revert to the Lessor on assignment. 2 Eq. Cas. 100 - 3 Wils 237. Godp. 133 - 803 - 8 T.R. 57 - 60 - 800.

Such a coo^t however, by Lessee, is broken only by a voluntary assignment on his part. If then the interest of a lessee is taken out of him by a creditor, the coo^t is not broken, for the assignment is made by operation of Law & not voluntarily by act of lessee - it acts as if in iudicio 2 Eq. Cas. 100 - 7 Vin. 85 - 8 T.R. 57 - 403 - 3 Wils 237.

Nor is such coo^t broken by an under lease of part of the term, i.e. part of the unexpired residue of the term, for that is not an assignment in legal language. I shall have occasion hereafter to notice the nature of an underlease & how it differs from an assignment. H. and. Vid. post 146. 7.

Nor is such a Lease violated by ~~an~~ a Devise of the term to take effect from the death of the Devisor, altho' it be voluntary, still it is necessary that it should go to some one or other, if the term is unexpired at the death of the devisor. Taly. B. is Lessee for 20 yrs & dies at the expiration of 10 yrs. of the Lease. The unexpired residue must of course go to some one; it must in short go to his Representative or Legatee & therefore a Devise of it, is no violation.

of a covt. 2 Bl. R. 766. 3 Wils. 234. 8 T. 59.

Indeed, it would be safe I trust to lay it down as a General Rule, that such a covt. not to assign is not broken by any assignment effected by mere operation of Law, as if the party becoming a Bankrupt, an alien, enemy, or felon &c. The Law there, only contemplates voluntary assignments.

I have been considering the cases in which the assignee is liable, but I must observe again, that the original Lessee continues always liable on his express covt., the liability of the assignee, notwithstanding. It does not follow, that because assignee is liable, the Lessee ceases to be so. He is ever liable for a breach by himself or assignee. You see then, that he cannot by any assignment exempt himself, from liability on his own express covt. For if Mr. Rent is to be paid for 20 yrs. - he is an insurer that it shall be paid. The words of the covt. are, "I covenant for myself & assigns for 20 yrs. i.e., I bind myself, that my assigns shall pay & in case, they do not pay, I will. 3 Co. 29-3. - 10 Pl. 120 - Doug. 443 - 4 T. 90-100. 10 Pl. 199 - 1 Homb. 353-4 - 1 Hbl. 439. 2 Bl. 327 note 10. 2 Hbl. 133.

But if the lessor has accepted the assignee as his Tenant, instead of the lessee, as he may do, by taking Rent from him &c, he cannot after have debt for the Rent agt. the original lessee, for debt is founded on priority of estate. Crof. 334. 3 Co. 23 a. 1 Hbl. 439-44.

But where there is an express covt. by lessee for the payment of Rent, he is liable on Covt. Breken for the Rent, tho' the Lessor has accepted the assignee as his Tenant, for in this case, the covt. for the payment of Rent, being express the priority of covt. remains, tho' the priority of estate is determined by the acceptance of assignee as Tenant. Crof. 309-520 - 10 Pl. 100 - 1 Sid 402. 7. 1 Saund 237 - Bull 159 - 1 Homb. 354.

But where there is no express cove. by lessee for cove.
pymt. of Rent, the lessee can maintain no action agt. the
original lessor, after accepting the assignment as Tenant, for
any claim. If then, the lessor has accepted assignee, he can
support no action whatever agt. lessee on an implied cove.
for the pymt. of Rent. The implied cove. is always grounded on his-
tory of estate between lessor & lessee, which is totally destroyed by
the acceptance of assignee as Tenant. Hence there can be
no claim agt. lessee by lessor for subsequent breaches, when
there is no express cove. But as to covenants that accrued before
assignment, the lessee must remain as he was. Co. 2, 522 - 1145.
1145 - 1146. 437 - quote 360-22 a. 1146. 354 - 1147. 241 - 1148.

It ought here to be observed by way of explanation,
that a lessee can accept of an assignee as Tenant, not only by accept-
ing Rent, or by an express assent to the assignment, but by
any act which evinces such an assent. 1145. 408 q. or 38.

When the cove. for Rent is express so that les-
see's liability continues after assignment, the lessor may per-
sue his remedy after the assignment agt. the lessee or as-
signed at his election, or both in diff. actions at the same time.
Yet no more than one (recovery or satisfaction) can be enforce-
d. He may however obtain costs from both. If after one sat-
isfaction he pursues the party, the latter may be relieved by an
Audita Querela, i.e. on Tender & Pymt. of costs, he may
be discharged. Co. 2. 523.

I would further observe that by Stat. 32 H. VIII.
which is an ancient St. & prima facie binding here, the gra-
tee of the lessor or the reversioner as most usually called, has
the same remedy on Covenant, running with the land,
as the original lessor himself had, according to the distinc-
tions above taken, he being placed precisely in lessor's sit-
uation. At C. 4. it was supposed, that he had not this right,

Such by the same Stat. The Grantee's Lessee or Assignee shall have the same remedy ag^t the Grantor of Possessⁿ as he had ag^t the lessor according to the distinction above taken, i.e. precisely the same as he had at C. L. ag^t the original lessor. 1 Lush. 213 16 - Bro. 372 - 3 Geo. 22. 4 Bac. 277.

In explaining the liability of assignee of a Lease, I observed, that the Rule, subjecting him, did not extend to a Derivative Lessee, or Sub Tenant. The difference between them, I did not explain.

An Under Tenant or a Derivative Lessee is one who takes a conveyance of only a part of the unexpired residue of a term, & is never considered as an assignee. Thus suppose I lease to B. for 20 yrs. at the end of 10 yrs. B. assigns the whole residue to C. - C. comes in the place of B. & is an assignee. But if after 10 yrs. he had made a lease for 5. or any other time, short of the whole residue then he would have been a Derivative Lessee, and not an assignee. And a Derivative Lessee may take the whole residuum of the term & still retain the character of a Derivative Lessee, provided he takes as tenant to Lessee & not to lessor. So that the definition of Derivative Lessee, should be, one who takes a conveyance of only a part of the unexpired residue of a term, or who takes the whole residue as Tenant to Lessee. Doug. 174. 3 Wils. 234 - 2 Bl. R. 766.

I again observe that such a Derivative Lessee or Under Tenant is not bound by the coven^t in the original lease as an assignee would be according to the Rules above laid down. The reason is, that as between him & the lessor, there is no privity; none of coven^t because he is not a party to the original coven^t - none of the estate because he holds under Lessee, who is reversioner & landlord. H. and. & 1 Toulb. 347. D. Doug. 438.

The Rule was formerly holden the the same as to the Mortgagee of the whole residuum of the Term, unless, he took partⁿ.

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ie. he was not liable on the c^od. of lessee, who was his Mort. gagor. because he took only in incumbrances & not as Broken purchaser. But it has since been determined, that the Mortgagor of the whole reversion, is liable on the c^od. precisely as a purchaser, whether he be in possession or not. For the old rule laid. Doug. 438. 1 Bl. 114. 1 Cond. 502. Contra. 1 Ves. Jr. 335. See the different opinions in 3 Bro. Chy. 116. 1 Ves. 19. 3 Atk. 512. 7 Atk. 306.

From what I have observed, you will perceive the difference between an assignee, properly so called & an Under Lease is, that an assignee, is a Sale of the whole of lessor's interest. but an Under Lease is the creation of a Tenancy, under the Lessee. The assignee is a Tenant of lessor & there is a privity of estate between them, but the Under Tenant has no such privity with the lessor. of course, he is not bound by covenants in his favour, altho the Lessee might be. Stra. 405. 3 Wils. 234. 2 Bl. R. 766.

Assignees, properly so called, are liable according to the distinctions already taken, whether the assignment be by deed, devise. Sale under Exec^r. or as it would seem by any other mode of transfer by operation of Law. Thus if lessee becomes a Bankrupt, his lease is ipso facto transferred; so if he dies, it is assigned by law to Ex^r. or Adm^r. & it seems to make no difference, whether the transfer be by operation of law, or the act of the parties. Doug. 177.

It has been made a question, whether an assignee of part of the subject of a Lease (not of the term) is liable for Rent or any part of it. or in other words, can the Rent be thus apportioned? Thus if I lease 100 acres - I assign 50 of the same; can I come upon C. for part of the Rent? Co. R. 633 766. From analogy of a recent decision, it would seem, that it might be thus apportioned; for it has been decided, that when an assignee has been evicted of part of the premises, he may be compelled to pay

great protante: in this way the Rent may be apportioned 2 Inst. 37. The analogy between the two cases is so strict, that I should think, that the Rent might be apportioned in both. Kid. ante 142.

A lessee, co. t. for himself & assigns as long as they shall be in possession & he or his assignee continues in possession after the expiration of the term, he is liable on the co. t. altho' at that time not strictly lessee or assignee: If he is so de facto, he is liable as such on the co. t. & ought to be subject to it for he ought not to be allowed to assume the character of lessee or assignee, to receive all the benefit & then renounce it to avoid the liability. Giles 407 - 2 Lam. 2. 564.

Thus far of those covenants which do & those which do not run with the Land.

There is another Species of Covenants which require a distinct cons. viz: COVENANTS OR BONDS (for they differ only in form) to save Harmlless.

A Covenant to save harmless, may, I trust, be defined the one by which the covenantor covenants to secure or indemnify the covenantee agt. some Loss, Damage or Charge, to which the covenantee may be exposed, as a co. t. by principal debtor, with his surety, as in a Bond of indemnity or Counter co. t. This Species of Covenants is not defined in the Books.

I would observe first, that these covenants are not broken by the tortious acts of another. They appear to be somewhat in the nature of a Co. t. for quiet enjoyment, which, you will recollect, are not broken by tortious entries & trespasses.

So if the creditor should falsely imprison the surety & covenantee, the co. t. is not of course broken, tho' a lawful enforcement of the claim agt. the surety would be a breach.

So if an assignee co. t. to save the lessor harmless

from any claim for Rent, & the Lessor illegally detain, it is not a
breach. 1 Roll 434 - 4 Co. 86 - Cro. 443 - 11 Mod 214.

Co. 4
Baker.

On a Co. to save harmless, the co-accused, may in
some cases, maintain an action agt. co-accused on the ground of his
more liability to a suit, because the co-accused has suffered him to
become liable. & this is usually the case when the co-accused's liability
is increased, after the co-accused of indemnity was executed. Thus a Shp.
takes a Bond or Co. to save himself harmless, agt. the escape
of a person having the liberty of the Goal Yard. If the prisoner
or escape, the Shp. may immediately bring his action, altho. he
has not yet been subjected. For he was immediately liable over to the
creditor, whether actually damaged or not & on this ground
he may sue. The liability being deemed in construction a breach
of the Co. Cro. 453-123 - 1 Mod 511-11. 11 Mod. rule 55.

So also, if a surety for a debt be paid in future, take
a Co. or a Bond of indemnity from the principal debtor & the
debtor fails to discharge the debt at the time appointed, the su-
rity may sue on the Bond immediately, because his liability
is a breach, altho. the surety has not been compelled or called upon
to pay the debt. 2 Bulst. 231 - Latte 196 - 5 Co. 2. 46 - 1 Mod 507 - 2 Bl 100.
2 Bl. 404. n. 23.

But suppose after the surety has recovered of the prin-
cipal, the creditor also collect his debt of the principal, so that
the surety is not called on at all, the principal's only remedy is by
Bill in Equity, stating the two judgments, with the attendant cir-
cumstances, & that the surety ought not in conscience to retain
the money. The Court of Equity will consider him as a Trustee
of the money & will decree repayment of it.

It has been made a question whether Indebitatus
& Assumpsit will lie, for this money agt. the surety. I am clear-
ly of opinion that it would not, for by the principles of the C. G. there
is no case in which an action will lie, when the object & necessary
effect of a recovery will be to impugn a former Judgt. vid. —

3 Burr 1354 - 2 Raymond's opinion. The case of *Hess v. Harland* (2 Burr. 1005) does not apply. That case has been questioned. 7 T.R. 269 - Judge Keene, I believe, disagrees with the opinion advocated in the last authority. The supposition of which that case in *Hargrave* proceeds is correct, but the authority of the decision has been much questioned. 2 N.B.L. 414 - 16. where it is flatly denied. 7 T.R. 269 - 1 Day 130 - 1 N.B.L. 666 - 4 T.R. 102 - This case goes on the implied commission, but it is not law.

If one having obligated himself as surety, takes a bond of indemnity, after his liability, as surety, has attached, he has no right of action upon the cov. until he has been actually damaged. Thus in the former case (on opposite page) if it had executed a bond of indemnity & the original obligation had become due. For as if the obligation were by single bill, payable instantly, or by promissory note, payable on demand, the surety must have been actually damaged before he brings his action, otherwise there is actually an evident absurdity in the law, the object of the law, being clearly to insure against damages that are to arise in future; that are to arise in future by some act of the principal; for if the consequence, in this case, could sue on the ground of mere liability, the Cov. must be considered as broken & instant. That it was made & the consequence immediately liable, which is not the intention of the parties. 6 D.R. 53-123 - The distinction is clearly laid down. 1 Salk. 196-5 Co. 24 - 2 Bull. 234 - Root 570. 2 Bl. 404 n. 23.

If the surety, having a bond of indemnity is obliged to pay the debt immediately, he may have *Indeb. Assumpsit* against the principal, as for money had, paid, laid out & expended for his use.

But if he has taken a Bond, the implied coven^t of indemnity is merged in it & thus he must resort to this higher remedy. Co. p. 525 7- 2 W. 100- 1 W. 599- 3 W. 13- 262-346.

Govt.
Broken.

When there is no specialty taken by way of indemnity, the remedy of the surety ag^t the principal is upon the implied promise of indemnity arising out of the transaction & a right of action arises in favor ^{out} of the happen^d of the debt, & what is equivalent to it being taken in execution. 3 Wilson 13.

The same remedy upon an implied coven^t exists between Co-sureties, for contribution, when one has paid the whole, or more, than his proportion, he may bring Indem. Assumps^t. for when two or more become co-sureties, the law raises a reciprocal implied engag^t. that if one is compelled to pay the whole the others will contribute & thus he may recover of each his aliquot part. 2 B. & P. 268. 70- Pea. 201 220 2 Day 492- W. 456.

If, however, there are more than two Co-sureties the only remedy between them is in Equity, because the action would be so numerous & complicated, that the business could not be adjusted by Law or at Law. 2 B. & P. 230 note.

There are two Rules in regard to Releasing Covenants, that require mentioning. In the case of Chasce in action a Release after an assignm^t. is, in some cases good & effectual & in others not, i.e. in some cases it will operate as a discharge - in others not.

On this subject the general Rule of discrimination is, that if the instrument creating a duty is not assignable at Law, a Release, tho' made after assignment will be effectual to discharge it. But when it is assignable or strictly negotiable, a Release after assignment will not discharge it. Thus & gives B a Note not assignable.

B. assigns it & then gives a Release. The Note is discharged because not being assignable. The action upon it must be in B's name; of course a Release from him must bar the action. But if the Note was negotiable such a release could have no effect for the legal title is transferred to the assignee or indorsee before the Release is given, so that A. has no interest at the time, the whole is in C. who is bringing the action in his own name.

In pursuance of this principle, if a Lessor after an assignment of his reversion release to Lessee all the covts in the Lease, still the assignee of the reversion can recover for all the breaches occurring after the assignment, notwithstanding the Release, for the reversion is assignable, so that the assignee has the legal title & the action is the brt. in his name. 2 Geo. 286. Cro. 503 - 1 Nott. 345.

It has however been determined, that a Lessor can deprive his assignee of all the benefit in the covts in a Lease, by a Release to the Lessor, tho' given after assignment, provided it be given before action brt. by assignee because by commencing a Suit a right of recovery is attached. Why such a release should ever be effectual, I never could discover: it is contrary to principle & analogy that it should. The case supposed is of a Covt. running with the Land: it is precisely like a negotiable Note: the legal title under the covt. passes with the property to the assignee & yet it is said, that if an assignor give a Release before action brt. it shall discharge Lessor. However the Rule is well established. Cro. 361 503 - 1 Roll 411. Esq. 300. Cro. 503.

It is a General Rule in relation to Covenants in general, that a Release from Covenantee to Covenantor, altho' in the most general terms - as of all claims demands

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quite, actions &c. given before the Co. is broken, is no-
bar to action on the Co., because at the time of the release, Co. is Broken.
there is no demand existing. Thus, suppose such a release
given from a lessee & lessor, who had entered into a Co.
of Leasehold & the Lessee is afterwards evicted.

So too, if afterwards Co. is broken I should a House in 12
Mo. & in one mo. afterwards the covenant, executed to
A. a Release of all demands - it does not effect the Co.
But a release of all Demands or in terms, equally gener-
al, after it is actually broken, discharges all damages for the
breach - And if one deed contain a variety of Co., some
of which at the time, are broken, & some not, the discharge will
be effectual, as to the former only. Bull 166. 1 Inst. 291. b. Cro. J. 99.
- Lat. 171. - 11730. - 1 Sh. 90.

But the General Rule before laid down viz. that
a Release of all claims & demands, &c. before Co. is broken,
does not effect the Co., cannot as I conceive, extend to
absolute Co., for the future payment of money, because
they create a debitum in presenti, & there actually is some-
thing due released; something in the nature of a demand.
there is, (there) in this respect, no difference, between Single Bill
penal Bond & Co. - Wherever debt will lie, I think the
rule does not hold - and a release of all demands, will clearly
release all unconditional engagements, or absolute instru-
ments & pay money in future.

A Release of all Covenants, tho. executed before
a breach accrues, will discharge a Co. of Warranties, & do an
act in Specie, or any other Co. & bar all actions upon
them. For there is a manifest difference between a release of
this kind viz. of "all Co." & a Release of "all Demands",
according to the terms of this release, it must act directly on
the covenants. "I release to you all Co." Such a release

entirely destroys the Co^ot. & of course takes away all liability that ever could accrue upon them. *2 Ky 510 - Dyer 37, 100. 9. 307.*

Of Pleadings in Co^ot. Broken.

Under this head I shall recite to you, the Rules that are exclusively applicable, or at least appropriate to this action.

The Declaration in the action of Co^ot. Broken must always state that def^t. covenanted by De^d. & this is an indispensable averment, because at law a Co^ot. cannot exist except by deed, or a Writing under Seal, of course without such an averment the De^d. would be ill.

And there is this distinction to be observed, that when the Instrument is under seal, Covenant Broken lies & is the proper action, but Case, or Assumpsit, will not lie. On the other hand, on a Co^ot. in Writing without Seal, Case or Assumpsit will lie, & Co^ot. Broken will not, because Co^ot. Broken lies only on a Co^ot. & there can be no Co^ot. without Seal. *bro. 517 - bro. 100. 209 - Stra 811 - 1 Chitty Pl. 113-14.* In this last authority some exceptions are mentioned.

In an action of Co^ot. Broken, every de^d. after setting out the terms of the Co^ot. must allege a breach, for without a breach there is no cause of action. Most of the Rules in this part of the subject relate to the assignment of the breach. *et. 1st.* The first Rule is, that when the Co^ot. is gen^l, a gen^l. assignment of a breach is suff^t, to the assign^g of the breach may be gen^l. This Rule will not hold & converso; as to Pleading performance. Thus if Grantor covenants, that he will well & lawfully perform, it is suff^t. for covenantee to allege, by way of breach, that covenantee at the time was not well & lawfully performing.

of the cost with the mere insertion of a negative.

So if one cove^t not to buy or sell certain articles, with in a certain place & time, simply averring, that defe. had sold to diverse persons at diverse times, within the period stipulated, is safe, without specifying how. Hob. 171- De Kay, 470. Salk. 139- Esp. 9. 290.

Govt.
Broken.

The most general assignment is in the words of the cost. & this in gen^l is the more easy & better way of assignment. In a case of Cost. of Seizure, the most gen^l assign^t is, "that co-ventor was not well seized", merely negating the cost. b^laf. Bleg. 9 Co. 60- Esp. 299.

The breach must be always so assigned, as to appear on the face of the Record & clearly & necessarily within the Cost. Thus when lessee covenanted with lessor to cut no more timber, than was necessary for repairs; an averm^t that defe. had cut to the value of a \$100- was not suff^t. - the Court knows nothing of the quantity necessary for repairs. That is a question of fact. The value of the timber necessary for repairs might have been \$1000- So that it does not appear on the face of the Record that the cost was Broken. There was no apparent cause of action. The averm^t should have been, that defe. cut a greater value of timber, than was necessary for repairs viz: \$100. 6 Co. 354. Salk. 5- Doug. 203- Esp. 299.

If the p^{ty}, after assigning a breach narrows or qualifies it by subsequent words, he is confined to it as then qualified & must so confine his proof; Thus when one covenanted to use the land in a husband like manner, the Court for a breach averred, "that coventor had not used the land in a husband like manner but had committed waste"; if the latter words had been left out & there had been no qualification leaving the assignment gen^l, the p^{ty} might have proved & shown any misconduct or neglect, which amounted to a breach; but by that qualification he is considered as stating the breach & have averred, in that par-

particular mode of using the land in an unhusbandlike manner, then
 the p^l must prove the waste or loss of his action, as & this the de-
 f^e is confined, & for this only is de^f supposed & the p^l prepared. The
 averment would have been better, had it been, de^f has not ve,
 for he has committed to waste. 3 T.R. 307.

When there is a promise in the Deed, defeating the cov^t
 in a certain event, the p^l need not set out that promise & neg-
 ative it, for it is in the nature of a defeasance, of which the de^f
 may avail himself, by way of defence. That de^f covenanted
 that he would deliver certain goods at a certain time & place,
 provided, if he were not prevented by the danger of the Sea;
 it was determined, that a simple averment of non-delivery
 at the time & place without more was suff^{ic}, & that the omis-
 sion of the promise was no variance. Per Oyer de^f may stand
 that the cov^t contains a certain promise &c, & aver that he
 had been prevented by the dangers of the Sea; for as respects
 the rules of pleading, this promise is similar to the condition
 of a penal bond - it is a defeasance which the p^l need not set
 out in his de^c. Ray. 65. Esp. 300.

But the Rule is de^f as to the exception in the body of a
 cov^t for the exception must be set out & negatived. A promi-
 se annexed to a cov^t is properly a defeasance, intended as a
 defence for the De^f, but an exception is part of the cov^t
 itself, entering into a description of the subject matter & if
 omitted the de^c would be ill on Demurrer. Thus a cov^t
 to convey &c. excepting the Interest of J.D. This is not a cov^t to
 convey a good title, without more. I did not intend to convey
 the interest of J.D. the exception, then is clearly a constituent
 part of the cov^t; an omission of it therefore would work a vari-
 ance & the de^c might be demurred to. Esp. 300.

If a cov^t is in the alternative, as to do one of two
 things, the breach must be assigned as to both; otherwise, the

deem will be ill. Thus when the lessee conveyed not to cut wood without the assent or assignmt. of lessor, an avermt. in a demurrer by lessor, that lessee cut wood without his assignmt. was holden in suff., for deft. might have cut with his assent, altho there were no assignmt. A proof of cutting without assignmt. is perfectly consistent with cutting with lessor's assent - here is no breach upon the Record. 1 Geo 250. 251. 300.

Court
Broken.

But covenants which virtually & in terms are in the alternative, are not always so in legal effect & in such cases, the last Rule would not apply. Thus where one cove^t. to pay, or cause to be paid, it is suff. to aver that cove^t. has not paid, without saying more, for causing to be paid, is in effect paying & maybe so pleaded in accordance with the maxim "qui facit per alium, facit per se". And evidence that deft. had caused it to be paid, would support a plea, that he himself had paid - 1 Str. 229. 230. 300-1.

Again when one cove^t. to pay on one of two contingencies, whichever shall first happen, an averment that one of them has happened is suff. without averring it to be the first. Thus A cove^t. to pay B \$100. on the death or marriage of C. whichever shall first happen. An avermt. of the occurrence of either is suff. because whether it be the first or second is immaterial, provided the one has happened. 2d Ray 130. 231. 301.

On a cove^t. that an act shall be done by covenantor or his assigns, if action be bro^t. ag^t. assignee, the breach must be laid in the disjunctive. Thus that it has not been done by covenantor nor his assignee, for the cove^t. might have done it, altho the assignee had not.

But if the action were bro^t. ag^t. the cove^t. it would be suff. to allege, that he had not done it without more, for when the action is thus bro^t. it is presumed, that there has been no assignmt. but when the action is ag^t.

the assignee, there is no such presumption. *Salk. 139*
Shaw v. 220.

The first rule then, that the breach must be laid in the disjunctive is assigned & action agt. assignee, thus *Lease v. 204*. that he or his assignee will build a house within 10 yrs. upon certain premises, if the lease is assigned & agt. 10 yrs. action he took agt. assignee the lease must be in the disjunctive, & if agt. assignee, merely, averring that he has not done it, is enough. The guide rule is, that a party ought not to be obliged to show anything more than a prima facie right to recover; he need not anticipate any possible ground of defence; there could be no pleading, if he were bound to make it certain to every intent & particularity, in the words of Coke.

So if one cove. to do an act for a man & his assignee; as to make a conveyance; it is suff. for counter-aver, that Coven. has not made the conveyance to himself. An assignee is not presumed & it does not appear.

But on the other hand, if the action were brot. by an assignee, it would be necessary to aver; it would be necessary to aver, that the conveyance had not been made to counter-aver, or his assignee; The *decur. Stater* an assignee & of course, an allegation would be consistent with proper manner. *1 Salk. 139 - 2 Keb. 440 - 5 Mod. 133.*

In a Covenant for the payment of a sum certain, there can be no apportionment of the demand, & the breach must be for a sum certain; Thus when the freight for a ship covenanted to pay 100 lbs. for Ton. The 100 lbs. alleged non payment for carrying 10 Tons & 10 lbs. or 10 Tons. Now the cove. contains no stipulation to pay for the fraction of a Ton, & the above allegation is perfectly consistent with the fact, that deft. has paid for every

Law, & there can be no recovery, without obliging him to pay for the freight of a fraction of a Tow. But if the cod. had been 2 pags so much rate or Tow, the allegation would have been good, as the cod. would have covered the fraction 2
Lanc. 124 Alk. 19 - Esp. 303.

Govt.
Broken.

This assignment of a breach would be ill on Demurrer, yet if Def. pleaded his issue, instead of Demurrer, & verdict for Pl. - if he would enter a remitter, or permit the excess or fraction, he might in this particular instance, take Judg. for the residue or the amount or rate & the Quantity appears in the Decree. (Lanc. 658 / Root 66 - Esp. 303.)

Having explained the general rule, in relation to the pleadings on the part of the Pl. something remains to be said, as to the Pleadings on the part of Defendant.

The most usual Plea to an action of Govt. Broken, is, that of Performance. It has been customary in pt. not general in England, for def. to plead, that he has not broken his Govt. & this is intended as a plea of performance or what is equivalent to it, viz. that he has kept his Govt.

I think however that such a plea cannot be good in any case whatever, for it refers to the very every point of law, which may be involved in the question of performance & if it were competent for the def. thus to plead, Pl. might reply that def. has broken it, & thus no direct issue would be found - it appears to me then an irregular & inadmissible mode of pleading performance. 2 Wils. 156 - 2 Mod. 33 - 2 Bl. Co. 1312.

The particular facts on which def. relies, should appear, if there are any, if none, there can be no performance. It seems that it has been made a question by eminent

counsel in England. If the way of concluding his assignment of breaches, plf. says "I so deft. has broken his covt." and deft. pleads that he has not broken his covt., it is said, that it is a good plea; because it is a direct negation of the Deand & favours a complete issue. 8 M. 2 fo. 281. But this pleading is certainly bad if the averment is not issuable, it being a mere conclusion from the special facts alleged. 2 B. & A. 1312.

It is laid down as a rule that when the covt. in a DED are in the affirmative, it is competent for the deft. to plead performance generally, i.e. when the covt. are positive affirmations to do an act or acts & not negative, as to abstaining from doing them. 1 Ins. 303. Dof. 305-4 Bac. 91.

This rule however must relate to cases in which the things covenanted to be done, are in some measure indefinite or multifarious. By Covt. by Sh. to return all writs, or keep a Dof. & Sh. to discharge all the duties of his office, the plea in such cases should be, that as sh. he has returned all writs &c. But such general pleading is allowed in such cases only. Coof. 575-4 Bac. 91.

But on the other hand, deft. having covenanted affirmatively to do certain specific acts, if he pleads performance, he must do it, by alleging performance specially, of each specific act. If I had covenanted to enfeoff J. S. of all the lands of which I was seized on that day. If I. S. dies on that day, it is not sufficient for me to say, that I have enfeoffed him of all the lands I was possessed or was seized of, at that time, nor that I have kept my covenant, but I must plead, that I have enfeoffed him of such & such lands & then aver, that they are all of which I was then seized.

So any Exec^r when sued on his Bond or Coat, cannot Co^o.
 plead, that he has kept his co^o. nor that he has paid all the Broken
Legacies; but that he has paid such a legacy to B. Such
 a legacy to C. &c., & then aver, that these were all that the
 Will contained. bed. 749 - 1 Sams 117 note - 1 Ld. 752 - bro. 359 - 60 - 1 Bro. 303 - Salk. 498 - 1 Sid. 215.

The General Rule then really is, that when co^os are
 affirmative, performance must be pleaded specially; & the other
 Rule just laid down, that def. may plead performance gen-
 erally, is but an exception to it; general pleading being allow-
 ed for the purpose of avoiding prolixity, as in the words of Sir
 Ed. Coke of "avoiding infiniteness" & unnecessarily burdening
 the Record. Thus it is obvious, that after a Def^y Sh^p has served
 for years, it would be requiring of him a moral impossibility
 to say, that he shall allege specially all the official acts
 which he has done in the performance of his duty.

And there are other cases which are similar -
 as when a Brewer covenanted to deliver all the grain thrown
 out of his Brewery, he was allowed to plead generally; from
 necessity, in such cases such kind of pleading is allowable.
Coop. 575 - 1 Ld. 753 - bro. 749 - 916 - Wob. 643 - Esq. 305.

And a Plea of performance, whether general or spe-
 cial, otherwise than in the words of the co^o. i.e. not corre-
 sponding with the words of a Co^o. is ill on gen^t. Demurrer
 The reason of this rule is, that if the plea does not conform
 to this rule, it of course discloses no suff. defence. Wob. 455.
 Thus suppose an action bro^t. ag^t. Exec^r. on a Co^o. to pay
 all legacies in a will & he pleads, that he has paid such
 a legacy to B. Such an aver^{ment} to C. & so on, it without more,
 would be ill; for altho in fact these may be all the legacies
 given, yet it does not so appear; he should aver, that those
 specified were all, that the Will contained, which would be
 concluding in the words of the co^o.

I have thus far spoken of affirmative co^{ts}. When, on the other hand, some of the co^{ts}. in a deed are negative, Def. cannot plead performance specially as to them & when all are negative, he cannot plead performance specially as to any of them; but when some are affirmative & some negative, he must plead as to the negative co^{ts}, that he has not done the acts concerned; & as to the affirmative, he must plead according to the Rules above laid down. There is a Solicitor in saying that one has performed a negative cost; performance presupposes an act.

If however Def. should plead, that he has performed, it doubtless means, that he has kept his cost. & as the plea is defective only in form, not in substance, advantage can be taken of it only by special Demurrer. Brod. 233-69. 1 Ins. 303. Co. 576. Cam. D. N. e. 25. Esp. 305.

If however some cost. in a deed are negative & some affirmative, & the negative ones are void, Def. may plead, as if they did not exist - without noticing them, he may plead merely performance, as to the affirmative ones. As if a Dep. of Sh. among ^{other} stipulations were to cost. not to execute a particular kind of process - by the Rules laid down in Fille & Sheriffs & Glaciers. Such a cost. is illegal & void; as it is a cost. not to do one's duty. 1 Sand. 183 - 11 notes Moor 856 - Ass. 13.

When one cost. is in the disjunctive, Def. must show in his plea, which of the two things he has performed, as if he had covenanted to convey a certain tract of land or pay a certain sum of money, he must allege in his plea which of the two he has performed. 1 Ins. 303. Brod. 659 - 8 Co. 133 - 1 Sand. 117.

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And it is said, that if he pleads performance without this specific allegation, the plea is ill on general demurrer & so the Rule is established. Brod. 333 - Com. D. Pl. 2. 256 - 1 Bea. 311.

This rule does not appear correct on principle, for the defect is not, in the substance of the Plea, if either is performed, the con. is performed. The plea then should be ill only on Special Demurrer. & so says Bacon, who, however, is not of the least authority. 4 Bac. 91.

When one covenants to do an act which consists of what is termed matter of Fact, as to make a conveyance or execute a discharge, deft. must plead quo modo, i.e. not only that he has made or executed the conveyance or discharge, but also in what manner, that the Court may know whether it is safe in law, for the construction of such con. is: A conveyance or discharge is understood to mean a legal & valid conveyance & whether it be so, should appear of Record. Dyer. 229 - 9 Co. 25 - Hob. 67-107.

On the same principle if one con. to do an act which must appear of Record, as to levy a Fine, or to suffer a Common Recovery, he must allege performance & the quo modo, for this is matter of law. Bro. 560 - Co. Lit. 313.

There are some rules of Pleading, which apply exclusively to Bonds or Con. of indemnity on the part of deft.

On such Con. or Bonds deft. may sometimes plead non damnificatus by way of performance, i.e. plf. has not been damaged. In other cases, the mode of pleading is not correct, for deft. must plead not only, that the plf. has not been damaged, but also, the quo modo, in which he has prevented it - On this subject the first General Rule is, that if the con. is to discharge or acquit

the covenant from any particular thing ascertained in the instrument or deed as of a Debt or Bond, or Duty or non dam. is not a good plea, he must plead that he has acquitted or discharged the p^{ty}. according to the terms of the cov^t. & allege the *quod modo*. as by payment, tender &c. *Warrth* 374. 2 Co. 4th bro. 433. 4 Bac 90. *Warrth* 1174. 11 Bac 639.

The reason is, that as the def^t. has covenanted to do a certain special act he must plead performance specially according to the Rules already given; if the thing done consists of matter of law, he must plead the *quod modo*; but when the cov^t. is general to save harmless or to indemnify the p^{ty}. from a Debt or obligation or Duty or non dam. is not a good plea, he need not plead that he has acquitted or discharged the p^{ty}. according to the terms of the cov^t. & allege the *quod modo*, as by payment, tender &c. because no special act is covenanted to be done. Def^t. merely cov^t. to bring about a certain result, viz: to save p^{ty}. harmless, the manner is not stipulated - it may be done in various ways by cancelling the obligation or otherwise. *discharge* &c. *Warrth* 1174. *Warrth* 363-4. 2 Co. 4-12. *Warrth* 144. 2 Warrth 176 - 5 Co. 300-11.

But whether the cov^t. is gen^l. as to save harmless, or particular to discharge or acquit p^{ty}. of anything not ascertained in the instrument, not specifying as of the damages, costs & charges that may accrue in such a suit, non dam. is a good plea. The distinction depends on the circumstance of the thing being ascertained in the instrument; bro 2. 916 - *Warrth* 374 - 3. *Warrth* 252 - 11 Bac 639 note 5. *Warrth* 224.

The reason why non dam. is a good plea in both those cases, is that as the damages, costs & charges from which p^{ty}. is to be discharged, are not ascertained in the instrument, it is virtually a gen^l. cov^t. to save harmless or of indemnity, because non constat that any damages, costs or charges have accrued or will accrue in such a suit. I now, here, note a

Co. 1.
Broken.

diversity between this is a common case of a Co. & acquit to discharge a debt a bond is certain in the debt, in which it is clear, that I am to acquit you of a certain existing claim; but I am to acquit you of all damages that may accrue - it does not appear that any damages have accrued & there can be no acquittance of that which has no existence. I cannot plead performance *quo modo*, or specially, altho I have perfectly fulfilled my Co. & I should be entrapped by the rules of pleading if they required it. *Non dam.* is therefore a good plea, for it is in effect saying no more, than that the pff. has been damaged, by what I engaged should not injure him, & then if any damage has in fact accrued, it may be alleged in the replication. 1. Saunders note 4th 3rd 5 - 6 Co. 363 4 - 2 Co. 4 - 2 Will. 126.

Then *Non dam.* is a good plea, if defe. will plead affirmatively, as that he has acquitted & discharged pff. he must do it specially, i.e. point out the act by which he has done it - because his affirmative allegation implies, that he has done some specific act, & he must show what it is. So it will not do to plead, that he saved pff. harmless, without more, tho it would do, to say less, viz: that pff. has not been damaged. 2 Co. 3-4 - 6 Co. 363. 634 - 6 Co. 910.

If however defe. pleads in the affirmative generally, that he has saved the pff. harmless, without showing how, the Plea is ill on Special Demurrer, for it is defective in form only, not in substance. 1. 2 Co. 194 - 1. Saunders 117 notes.

Non dam. is not a good plea to an action on a Bond or Co. for the payment of money at a day certain, altho it appears in the instrument by way of recital, or in the condition of a Bond & have been given as a general indemnity, for the obligation is to perform a specific act. 1. 2 Co. 630.

If defe. pleads *non dam.* when the plea is proper, the

replication consisting of a general traverse, or a general allegation, that p^l has been damaged; it is ill; for in such cases, it is necessary for p^l to show a special breach & in what it consists, as that he has paid the money, taken in Deceit, otherwise his replication is ill. 1 Geo. 23- 1 Sid. 444- 4 Bac 92.

Of Joint, & Joint & Several Covenants.

If any number of persons cov^t. jointly & only jointly, they must be all joined as def^t. in an action on the cov^t. If two persons cov^t. jointly & severally, they may be joined as def^t. in the same suit, or may be sued separately, because they covenanted severally as well as jointly & may be sued in dif^t. actions at the same time. But, if three or more persons cov^t. jointly & severally, they may be all sued, or each severally; but two of them cannot be joined without joining all the rest, because the cov^t. must be treated as altogether joint, or altogether several, & if two are sued without the third, the cov^t. is joint as to them & several as to the third. This is the good rule of distinction, applying to all Joint & Joint & Several Contracts, whatever, whether cov^t. or obligations, promises &c. 1 Pl. 26- 1 Sid. 228- 2 Vern. 99- 3 Salk. 363- 3 Bac 697- 3 Bl. 701.

If there are two or more joint cov^t. obligors, all must join, as p^ls in an action on the instrument. For if each could bring a separate action, the cov^t. would be unnecessarily subjected to as many actions as there are covenantees. 2 Bl. 702.

And if in such case, one of two covenantees, sue alone, def^t. may either plead the nonjoinder in abatement, or upon Oyer & Recital, demur. 2 Str. 1146- 5 Co. 106.

If one of two joint covenantees dies in Deceit, or for

several Repts. can neither sue alone, nor join with the survivor. Co. 100^t,
 note in our action on the Co. 100^t, the entire right of recovery Broken.
 ory survives to the survivor. he is liable to amount to the
 Rept. for the quantity & this rule is common to all actions on
 contracts. Bro. & Co. 729 - 1 East 497 - 1380 445. vide ante 1. 2. 0. 9.

In some common cases when one covenants with
 two or more jointly & severally, one may sue alone & in
 others all must join. On this subject, the Rule is, that if the
 interest of the covenantee appears to be several, they may
 sue separately. but if the interest is joint, they must sue
 jointly. Thus if a man be one of the same deed lease Wm.
 acre & B. white acre & C. & Co. with both each of
 them as to the whole, that he has good title, each may sue
 alone, because the interest appears to be distinct and
 several - it is not a lease of an entire tract to B & C.
 & if lessor should prove to have title to Wm. acre it is no
 injury to C. 5 Co. 8-10-19-2 Dean. 47-2 H. 160 - Bull 157.

So also a Co. 100^t to have & B \$100- to be equally
 divided between them, each may maintain a sepa-
 rate action - ie. each may sue for his \$50- and each
 may declare upon the Co. 100^t as having been made
 to himself without naming the other, for in legal effect
 it is a distinct Co. 100^t to each for \$50- For tho. both Co. 100^t.
 are in the same deed, yet the subsequent words make them
 several & they may be so declared on, or each may declare
 on the Co. 100^t as it is & recover his proportion. Bro. & Co. 729 -
 Stra 76. 819 - Casp. 832.

But altho. both the Co. 100^t are in one deed & are
 inserted to be several as well as joint. Still if the in-
 terest of the covenantee appears to be joint, they must
 join in the action. As if I Co. 100^t with A & B. I say them
 or each or either of them \$100, without the words "to be equal

ly divided between them. So B must sue jointly, for they take jointly in Judge of Law. So then, if one binds himself to be co-obligor, jointly & severally in one deed, if their interest appears in the instrument to be joint, they must sue jointly, notwithstanding the introduction of the words of severally. You observe, that the rule is diff. as it relates to co-obligors & Co-tors. 5 Co. 18-19. Inst. 262. 11 Jac 532. 1 East 497.

From the Rules already laid down, it follows as a corollary, that the co-obligors & Co-covenantors may bind themselves generally & be so sued for something. Yet co-obligors or co-covenantors cannot have several rights of action for the same thing, for altho two persons may be sued in diff. actions for the same thing, yet the policy of the law will not suffer, as it ought not, one person to be sued twice for the same thing. 5 Co. 19th.

If two or more persons covenant jointly & severally, each may be sued alone for the default or neglect of the other, altho the one sued has not been in fault, because each is in the nature of a surety for the other. Thus if two D^s bind themselves jointly & severally to pay all the legacies given in a will, if A should receive all the assets, & pay nothing, B the other D^r may be subjected on the Bond. So if A should do that B should do a certain act, he may be subjected by B's default. Stra. 553.

And in these cases, where one of two persons jointly & severally bound, is sued & judgment recovered ag^t him, it is no bar to an action ag^t the other, for both continue liable until the debt is performed or payment made, & even tho his body be taken on C^o and committed for each is responsible at all events, that payment shall be made. & all proceedings not terminating in payment or satisfaction are no bar to future process. 6 Co. 46. Cro. 73. 3 East 251. 5 Co 86. Chit. lib. 174. 182.

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I have already observed, that if one of two joint obligees or covenantees die, the ^{deed} or ^{Rept.} of the dead cannot bring an action, nor join with the survivor. So too, if one of two joint obligors or coven^{ors} die, the other surviving, the liability survives agst the survivor - the ^{Rept.} of the dead is not ^{at} all liable, for as before he had no right, so here he has no liability, but if he is sued & compelled to pay the whole, he may oblige ^{the} ^{Rept.} to contribute. vide ante 1. 2. & 3.

On the other hand, if the con^{d.} be joint & several, as is then begun by it & one dies, the other surviving - the ^{Rept.} of the dead is liable at Law, not jointly, but upon a several con^{d.} or con^{t.} because when several, it is precisely in the character of two separate contracts. 1 East 404.

If two persons con^{t.} jointly & severally the word "or" in exposition is construed as "and". If construed literally, it would be at the option of the co^or^s & they could defeat any form of action. Str. 76 - Cowp 832. Ajd. 111. 105. 6.

If one of two joint ^{severally} coven^{ors} be made con^{d.} to coven^{antee}, the obligation is, in Law, released, in toto, as to both, for one of the debtor by virtue of his representative character becomes creditor also - he cannot sue himself & the Law will not allow him to sue his Co^or^s party. 3 Co. 136. Salk 300. 1 Ld. 164. 6. 31 Dec. 699.

That con^{d.} is discharged & no action can be maintained. In this case however a Court of Equity will compel payment or performance in favour of creditors & legatees of coven^{antees}, but not in favour of their mere ^{Rept.}, or Volunteers claiming under the St. of Distributions, but this payment is compulsory only, when the debt, & legacies cannot be paid without it. Salk 240. 1 Geo. 160 - 161. 373 - 2 Pow. 6. 254. 5 - 9. Mod. 62.

The reason why Equity will enforce payment in favour of creditors is obvious, "a man must be just before he

is generous". The appointment of a debtor &c. is in legal effect, making him a legatee to the amount of his debt, being a sort of negative gift. But as it is an implied legacy it is postponed to those, that are express: but a legacy express or implied is due preferred to those claiming under the Stat. of Similitudes & this is the reason why the coo^t. is not enforced in favour of heirs.

If an instrument begin "we A. B. coo^t. &c" & is signed & executed by A alone, he may be sued alone on it, because in legal effect, it is his sole deed, & altho. there is an incongruity between the after words & the signature, the execution is safe, as a ^{stat.} &c. - Indeed he merely takes the Royal Stile "that's all". 1 Burr 323 - 2 W. 32.

So if an instrument recites, that A. B. & C. covenant the one part, & C. does not execute it - A & B. may be sued upon it alone, averring that C. did not execute it. I do not rec. the use of a verdict, the fact sufficiently appears. It is however usually inserted out of abundant caution. 2 Sha 1146 - 1 Burr 323 - 2 W. 47.

If two or more bind themselves in one obligation or by one promise, the coo^t. is of course joint, tho. the word jointly is not used, unless the word severally or some one equivalent is used which would imply severally of obligation. Thus we A & B. promise to pay L. & D. \$300 - without "jointly or severally" being used in the instrument. 2 Alk. 31 - 2 D. Ray 1203 - 1 W. 236 - 3 Mac 697 -

But if a coo^t. or other instrument begin thus: "I coo^t. or promise" & is signed by two, it is several as well as joint, whereas if it begin with "We", without words of severally, it is joint only. When "I" is used, it must be taken distrib

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tively; indeed it is impossible to consider it joint merely. ^{Govt.}
Coop 832 - Lea. Cas. 130 - Chitty Bills. 2 - 175 - Stra 76 - 809. Archer.
D Ray 1544 - 5 Burr 26th.

A bond made by a stranger subsequent to & not in
pursuance of cont. debt. merge it; but where two or more are in-
debted it is bound by one will. 5 C. H. 14. 26.

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lost
Broken.

V. Bailment.

By Judge Gould

A Bailment is defined to be a delivery of goods, upon a contract express or implied, that they shall be restored to the bailor or according to his direction when the purpose for which they are bailed, shall have been consumed. 2 Bl. 451. Jones 3. 48.

Every Bailment

rests on a qualified property in the bailee, & this principle is of extensive practical application. It is said in the old books that a pawnbroker differs from other bailees, because ^{he} has a special property in the thing bailed; but there is no such distinction. Every Bailment confers an interest specially, or a qualified property, in the bailee. Lord Coke lays down the distinction alluded to 1 Bac. 94. Doct. & Stud. 129. ^{101. 172.} Jones 112. 7 T.R. 392. For the distinction, vid. 4 Co. 55. 1 Inst. 87. Nels. 172. 2 Salk. 86.

Indeed it may be stated as a proposition, that admit of no exception, that a mere lawful possession which of course, presupposes a limited right of possession includes a qualified property or special interest ^{was} so determined in case of finding. Stra. 515. 7 T.R. 392. 7. 8. 9. 2 Bl. 452.

By the definition the bailee is to restore to the bailor, or order he. It is not for seen this to be understood, that he is answerable in all events for either he fails to restore it, yet if it be in consequence of a loss without any default in him, he is regularly not liable. 1 Bac 236. Jones 8.

But to note since

when he is in fault in case of loss or damages sustained the nature of the Bailment, & the quality of the thing bailed, as well as the bailor's own conduct are to be regarded.

Different Bailments require different degrees of care, for what would be deemed extraordinary care in case of large bulky articles bailed, might be gross neglect in property of a different species. Jones 8. As a Box of Nails or Jewels.

And the principal enquiry under this title is to

ascertain in all cases what degree of care & diligence of the bailee had & that is to be known in what cases the bailee is entitled to recover & the burden is on him.

The most general Rule is that when the bailee is under a gen. acceptance, he is bound to keep (as the case may be) the goods with a degree of care proportioned to the nature of the bailment.

An acceptance is said to be general when there is no special agreement with the bailee with respect to the degree of care or diligence he shall use, or the degree of responsibility he shall incur in, when it is not left to the law to determine what care & diligence is his duty to use, & to be accountable for not using.

But on the contrary a special agreement by which the goods are hired is a special acceptance, by which the bailee's liability is either extended or qualified. he may then enlarge or diminish his legal liability to any degree. *expressum facit tacitum cessare*. When there is an express agreement the one implied by law is excluded.

And the diff. rules take hold down in relation to the degree of care ^{or} diligence, ^{are} to be understood as showing preference to cases of general acceptance only, for where there is a special acceptance, that according to its definition must determine the requisite care & diligence.

The law distinguishes the diff. degrees of diligence or neglect into three classes without noticing the minute degrees that may ^{be} found among them.

The standard by which these different degrees are measured is called "Ordinary Care" or "Diligence". By ordinary care is meant that which rational men in gen. use in their own affairs, & this is the great or the standard, or middle term by which the others are measured: In other words, Ordinary Diligence is that which every rational man of common prudence uses in his own affairs. *Jones. 9. 10. 2 Bl. 453. n. 11.*

The degrees of diligence on each side are not distinguished by any technical or

appropriate consideration, but we suppose by a Bailment. Bailment
 that degree of diligence care is called more than ordinary
 or I think, what you call extraordinary.

It will be observed that
 every degree of care a bailment has is corresponding to a
 of default & neglect. A neglect as here used, consists in the want
 of admission of care of some degree. Hence the omission of or-
 dinary care is called Ordinary neglect.

The omission of
 that care which attentive & diligent men only use in their
 own affairs, is less than ordinary neglect. But the omis-
 sion of that care, as inattentive & careless men use is more
 than Ordinary neglect. Jones, 11, 13-30-1. 2 Bl 453. n. 11.

The omission of
 slight care, or such as negligent men use, is generally called
Gross Neglect. This, in gen. is regarded as evi of fraud or want
 of good faith, but it is not decisive for either, when shown
 it is prima facie evi. of fraud, for if the bailee has been guilty
 of the same neglect with respect to his own goods, the pre-
 sumption of fraud is excluded, yet the neglect is the same
 i.e., Gross. 2 Ray, 915- Jones 30-55-64.

The most general Rule
 on this subject, I believe is, that the bailee, under a Gen. re-
 ceptance is to use such a degree of care, as the nature of the
 Bailment requires.

Now to apply this Gen. Rule to particular
 cases, it is necessary to observe Three other Rules viz:
1st When the Bailment is exclusively for the benefit of the
 Bailor, so that the Bailee derives no advantage from
 it, the Bailee is bound to nothing but good faith & is liable
 for nothing, less than Gross Neglect.

This rule proceeds on the
 maxim "qui sentit commodum debet sentire onus", i.e. "who reaps
 the benefit ought to bear the risk". As where one engages
 another to keep or convey goods or money, whatever the
 rules of civility may require, the Municipal law subjects

12-1-11-11-11 Contra 4 Co. 82⁶

It is held, also, that the boiler is bound to leak. The work at the boiler is, with the strictest care, but this will not stop leakage advanced in that case is a boiler except these vision which prove the above appears to be correct.

again that these rules apply to cargo of General cargo only
by you by a special acceptance the bonded facilities may be
extended to the risks whatever. Jan 22-3-61. 2. D. 910.

II.nd When the bailee only is benefited he is liable a simple Neglect, i.e. he is bound to use more than ordinary care in case of Horse or Carriage let at the principle that governs is the same as in the former rule, when the Bailor only was benefited, Lanc, 15-23-33.

III. Where the Bailment is for the benefit of both, i.e. mutually advantageous the risk is usually divided between them; the obligation hangs in an equal balance & the bailee is bound to use ordinary care & nothing more & is liable for ordinary neglect & nothing ~~more~~. *Ess. on torts* 4th ed. Janes 14-15-16-23-33-89. 101 5.

I proved ^{to explain} & enumerate in their order the Rules applying in cases where the Acceptance is general.

Of the Different Kinds of Bailments.

The Divisions
in Bailm^t are six. Sir Wm Jones makes but five, & I can pass
the E. & S. division does not appear some take the most Logic
al, it is however the division made in the great case of Coggs
& Bernard, the Magna Carta in the Law of Bailm^t & other
authorities & is the one I have chosen to adopt. Before
the case alluded to 2 D. Ray 909- the law of Bailm^t was lit-
tle understood, even in Westminster Hall.

Ist Bailment of the first kind or class is a Bailment a Deposit, rather Latia Depositum. This is a delivery of Goods to be kept for the exclusive benefit of the bailor & without any reward to the bailee - This is sometimes called a naked Bailment & the bailee, naked bailee - I shall call him a Depositary D.
Ray 912 - Bull. N.P. 72 - 1 Pa. 247. Lanes 50.

IInd Bailment of the second class is termed Mortuum. There is a single English word to distinguish this kind, it is however a quite long loan word to be used by the bailee for his own benefit, & is where a loan is a carriage or an utensil for use for use & return, specially. It is a gratuitous loan - the bailor is called the Lender & the bailee the Borrower. D. Ray, 914 5. Lanes 41. 137.

This species of Bailment differs from what in law is called, mutuum tho in some particulars they are precisely alike.

A Mutuum is a loan of generally fungible goods but it is for Consumption & not for use. It is the property of the same ^{kind}, but not the specially return & for this reason a Mutuum is not a Bailment. Thus, a money loan or any article of food, which are never intended to be returned, but consumed. The bailee properly acquires the property in the thing, & in case of a loan, even the moment the property is received, he bears it in all events, because it is the loan of his own property & not that of another. D. Ray, 12 p. 114. 241 - Lanes 89-90.

IIIrd Kind is Locatio et Conductio, This is a delivery of goods to be used by the bailee for a Reward or Hire to be paid to Bailor who is called Lessor & the bailee Conductor, as where a carriage or horse is hired. I should call this letting & hiring as the former class is lending & borrowing. It is in fact a letting on one side & a hiring on the other; This however is not legal language - Lanes 50. 115 - 1. Pa. 251 - D. Ray, 913.

IV.th Is a delivery of goods to be carried or some act done about them by the bailee for a reward or public use. There is not much appropriate documentation given to this class Delivery. 913- Jones 50-104- 1 Paw 251-2.

V.th Is a delivery of goods to be carried or some act done about them by the bailee for a reward or public use. There is not much appropriate documentation given to this class Delivery. 917- Jones 50.

This class includes not only delivery to common carriers who act in discharge of some public employment but to private carriers or bailees, as to Common Haulage or a Master of a ship. So also a Tailor. &c. with.

VI.th Is a delivery of goods for conveyance or for some work to be done about them gratis. & Bailment of this kind includes Mandatum & the bailee Mandatory Delivery 913-18- Jones 73.

I.st The first kind now considered, & explained is what is called a Deposit; being a delivery of goods to the bailee to be kept without any reward or advantage to the bailee & to the benefit of the bailor only. And of course by the Three Rules before cited the bailee is bound only to the observance of good faith & is liable at most for Gross Neglect only. Nothing short will subject him.

Such gross neglect subjects him only as bringing him a civil case. & fraud or want of good faith & hence it is said that he is not liable in all cases for Gross neglect. See 8 Stur. 129. Delivery 909-13. & the 1099- 1 Paw. 247. Bull. P. 72. Jones 32-64. 5. 1 & 2. 158-

And that it is the presumption of fraud only that subjects him, vid. Delivery 915 2 Bl. 452- & the 581 Jones 13 30-64. 5-6. Delivery 655-

It is true that you will find it laid down that Ordinary care will in this case excuse a bailee, which seems to imply that want of Ordinary care, or by being guilty of Ordinary Neglect, will subject

him, but it will not. The truth is the expression was made by Bailmt. for the term "ordinary" was precisely defined. And Lord Holt uses it in this vague sense altho' he clearly supports the rule now laid down. 20 Kay 913 - 1 Bos 247 - 8.

I repeat a Depositary is not liable for Gross neglect in all cases. Indeed it appears to me to be the correct way of speaking & thinking, that he is not liable at all for neglect as such, but merely for the frauds presumed by or from the neglect; for it is agreed if there is no fraud, he is not liable.

In this subject Lord Holt observes that if the bailee is ~~a~~ a negligent drunken fellow, it is the bailor's own fault if the goods are lost; he should not have trusted him. I think then it is strictly true, that a Depositary is liable for fraud only. 4 Bur 1300 - 1099 2 Hay 555 - 914 - Jones 65.6

I would remark again, for I cannot repeat it too often, that a Depositary may by a special acceptance or agreement, subject himself to a liability to any extent, even for inevitable accident. You will observe, I have been speaking of the law in relation to bailors under the gen. acceptance. 20 Kay 655 911.13 - 3 Reeves 117 of Eng. Law 245.6 - 394.

Sir. Wm. Jones introduces another exception when an ostensible bailee, depositary by his own offer he is bound to be ordinarily care & to be liable for ordinary neglect. But this distinction is too nice to beance practical & is not required in judicial decision. Jones 67.

The old opinions are very diff. from the rules now laid down. Southcote's case was an action of detinue agt. a depositary, pte. declaring a special acceptance; defe. pleaded in bar that the goods were stolen & on demurrer pte. had judgment. The decision in that case, as it appears of Record is doubtless correct; but there is hardly a principle laid down in that case which has not been denied to be law; and it is a little strange that amid so much error justice should have been done to parties. 4 Co. 53. 1 Inst 89.

The 2nd. should have been stated without his assent. But the doctrine advanced in that case, that a bailee under general acceptance is bound to keep safely at all times, is not law. 6 Co. 134. 515. 2 Bar 236 41. Contra 5 Co. 135 911-13. 14. - The 1009- Com 1. 133 5. 134. 2. 2000. 59.

I would observe by the way that that expression of Lord Holt, that Southcot's case is a hard one, does not apply to the decision but to the doctrine in the case.

Again some have taken a distinction between a special account by the Depositary to keep, founded upon a valuable cons. & a special agree^{mt}. of such kind without cons.; & it is said, that the former binds him, but the latter does not. This distinction is entirely exploded; the more delivery is of such cons. to support his promise. And besides it is a solecism to say that the Depositary accepts a cons. for the moment he receives a reward he is a 1st bailor of the 5th Class - so that the very supposition involves a legal absurdity. I take the distinction to be bad on principle as well as overruled by authority. 1 Bar 241. 5 Co. 909-919. Doe. v. Stud. 129. 12 Mod. 487. 3 Reeves, Nis. & L. 245-6-394. *vid post* 230.1.

It was said in Southcot's case that if goods were left with a Depositary in a ^{locked} chest of which bailor had the key, the bailor was liable for the chest only, in any event, & not for the goods, for it is said, they are not trusted to him. 4 Co 83-4 - 11 Bar 287. - 1 Ins. 89 ²⁴⁶.

Said Holt, denying this in the case of Coggs & Bernard, for the bailor has sold the authority over the goods as to any benefit he might have by them where they are out of the chest, as when in & as much right to defend them when in as when out of the chest. 5 Co. 914.

And neither Coke nor Holt, notices the knowledge of the Depositary as to the articles in the chest & on a suitable ground, that appears to me an important fact for what in one case might be extraordinary care, in another case would be gross neglect. Said Holt would have him liable if the goods were stolen.

If it were not known what was in the chest it might

he doubtless knew for the bailee ought to be liable, unless his neg-
lect were gross as to the chest itself. 4 Co. 34 3. & Hk. 47. 1 Inst. 40.
Lan. 914.

The question is not definitively settled by authority and
I should not think it could be laid down unconditionally that the
bailee need be liable for the goods, not knowing the contents of the
chest, i.e. when not guilty of gross neglect as to the chest.

It is that a depository, or more than bailee might be liable in
some cases of gross neglect. But an unqualified undertaking
to keep safe does not subject him to all losses. For he is
excused from losses occasioned, by inevitable accident, or
wrong doers, who act by violence. A bailee will not protect
a safe such losses. But in such case I take it that the law
will not excuse, as it may be prevented, by vigilance. Lan. 915-10. Bac. 130. 12 Co. 248 y. Hob. 34. Lan. 625.

Indeed ac-
cording to the current of authorities & the ground on which they
stand, it appears that when a depository unqualifiedly enga-
ges to keep safe, he will not be subjected without some neg-
ligence, & that an engagement of that kind binds him to use or-
dinary care, & he is not liable for the acts of wrong doers.

II. Commodatum.

In England it is more
termed, Lending & Borrowing. It is a gratuitous loan of goods
to be used by the bailee for his own sole benefit & to be specifically re-
stored. The bailee is of course bound to use more than ordi-
nary diligence & care, & is liable for less than ordinary neglect,
i.e. slight neglect.

The requisite care must be diff. in diff. cases.
So that each case is to be determined by its own particular cir-
cumstances. One example has been given viz. He that borrows a
horse & places him in a stable without locking the straw
or is liable, if he is stolen, but if he has locked the horse in

the stable, he would not be D. Ry. 911 - 1 Nov. 249 200 Bull. 72
H. 244 - Jan. 91.

And it seems, that if a loan is made, and the horse is not returned, the borrower is not liable for the loss, he is prima facie liable. He will be subject to unless he proves that he used extraordinary care. Jones 61 note. 92. S. Kay. 916. 257.

But on the other hand, he is, in general, not liable for loss occasioned by such force as he could not resist, & hence a borrower is not liable prima facie for losses occasioned by robbery or theft, distinguished from theft, for there does not prevail such force any more than by theft. Thus, a borrower of a horse on the highway tho' he might subject himself by wantonly or carelessly exposing the horse; it appears that in case of robbery the borrower is prima facie not liable which places the onus probandi on the lender H. auth. & 1 Paw 257.

It is also stated a case that if a borrower should leave the highway & travel where there was great danger, as it was known that robberies were frequently committed there & ride on such road in the night, if he were robbed he would be liable.

But a borrower is not in general liable for those accidents called inevitable, as lightning, earthquakes, inundations &c. occasion. But he would be liable if he had wantonly exposed the property to destruction by such inevitable accident as by rashly putting a horse into a boat in tempestuous weather.

And a borrower might render himself liable for any loss however occasioned by a previous breach of trust, for from that time he is a possessor in his own wrong; as if one borrows a horse to go to Hartford & he goes directly to Albany, he would be liable for all the consequences of his illegal conduct; as for example the horse were killed by lightning.

It is a borrower's loss for a limited time as if he were
any other chattel subject to damage & loss by the time he
is liable for all the consequences; but not subject to all the
consequences of Bailment. See Ray 913, 17. 1 Mac 249 250. 1 Mac 244. Jones 956
Trotter, 244. - 1 Mac C. 253 - 1 Mac. 237.

Bailment

III. Locutio et Conductio.

In England it may be said
that in France, it is a loan of goods to the bailee & for the use of
which the bailee is to pay a reward to the bailor.

By this contract
the hirer gives a transient qualified property in the thing bailed,
& and the bailor an absolute right to the price or hire. See Ray
913. Jones 119. - 1 Mac. 2. 625.

Now the Bailment being mutually advantage-
ous, the risk on principle ought to be equally divided. The bail-
ee is bound to use ordinary diligence, & no more. & on the other hand
he is liable for ordinary neglect & nothing less.

This is what I take
to be the true Rule, but in Coggs & Bernard Lord Holt says the
hirer is bound to use the utmost diligence; if so, he is liable
for the slightest neglect, & so equally liable with a borrower;
but this is contrary to analogy & principle. The truth is Lord Holt
used words in that case very loosely as I think he did in this in-
stance.

There is no wonder that Lord Holt was misled by a borrower's greatly
liable & Lord Holt's opinion in his words would extend the hirer's li-
ability beyond all analogy even beyond that of a borrower. But the
principle is so well established that there is no hazard in say-
ing that a hirer is bound to use ordinary care only & to be sat-
isfied by ordinary neglect & nothing less. Jones 31. 1203. Indeed Sir
W. Jones traces this mistake of Holt, to a mistranslation of Latin in-
terpretation.

As there is no decided case requiring more than ordi-
nary care & as no analogy requires more; the hirer is of course
excused in case of Robbery. This if it be proved that he wan-

only exposed the property, he would be killed.

It was formerly a question, whether a bailor was not bound to keep in repair all the bridle; he had let for hire; but it is now settled that he is not, & that if the bailed wears out the instrument he must repair it for himself. 1 San. 321-1/2 ac 531. Doug 720.

IV. ^{2nd} Radium.

not far from the back of the boiler. Lines 50-104 -
 100-113.

And on this subject it must be material to observe that in analogy to the San de Torreyes, if goods were sold upon a debt due from the seller we can compare with it a redemption, whether only in the terms of the contract it is State a Pawn, & where goods were conveyed by an absolute deed & sale, it is frequently by another instrument that the purchaser had a right to sell: the Pawn had a right to redeem, it was decided for a pawn for once a pawn, always a pawn, 1 H. Bl. 114.

This kind of contract, being a discharge as to both parties viz: as securing payor's debt, & honoring & procuring credit of payee, the contract is bound to use ordinary care & to make no mistake less than ordinary neglect. This is agreeable to principle & authority. 2 Ray 917- 1 Bosw. 232. 2 Salk 253. Jones 105.

But in Southcotter case D. Coke says that the
Bailee is bound to keep the goods as his own & is liable like
a depository (at least) solely & the reason assigned
that he has he has a property in the goods. & But every bailee
has a property in the thing bailed, so that there is no founda-
tion for the distinction & the rule founded on it is not law.
4 Co. 83. ^{11th. 224} 12th. 224. 13th. 224. 14th. 224. 15th. 224. 16th. 224. 17th. 224. 18th. 224. 19th. 224. 20th. 224. 21st. 224. 22nd. 224. 23rd. 224. 24th. 224. 25th. 224. 26th. 224. 27th. 224. 28th. 224. 29th. 224. 30th. 224. 31st. 224. 32nd. 224. 33rd. 224. 34th. 224. 35th. 224. 36th. 224. 37th. 224. 38th. 224. 39th. 224. 40th. 224. 41st. 224. 42nd. 224. 43rd. 224. 44th. 224. 45th. 224. 46th. 224. 47th. 224. 48th. 224. 49th. 224. 50th. 224. 51st. 224. 52nd. 224. 53rd. 224. 54th. 224. 55th. 224. 56th. 224. 57th. 224. 58th. 224. 59th. 224. 60th. 224. 61st. 224. 62nd. 224. 63rd. 224. 64th. 224. 65th. 224. 66th. 224. 67th. 224. 68th. 224. 69th. 224. 70th. 224. 71st. 224. 72nd. 224. 73rd. 224. 74th. 224. 75th. 224. 76th. 224. 77th. 224. 78th. 224. 79th. 224. 80th. 224. 81st. 224. 82nd. 224. 83rd. 224. 84th. 224. 85th. 224. 86th. 224. 87th. 224. 88th. 224. 89th. 224. 90th. 224. 91st. 224. 92nd. 224. 93rd. 224. 94th. 224. 95th. 224. 96th. 224. 97th. 224. 98th. 224. 99th. 224. 100th. 224. 101st. 224. 102nd. 224. 103rd. 224. 104th. 224. 105th. 224. 106th. 224. 107th. 224. 108th. 224. 109th. 224. 110th. 224. 111th. 224. 112th. 224. 113th. 224. 114th. 224. 115th. 224. 116th. 224. 117th. 224. 118th. 224. 119th. 224. 120th. 224. 121st. 224. 122nd. 224. 123rd. 224. 124th. 224. 125th. 224. 126th. 224. 127th. 224. 128th. 224. 129th. 224. 130th. 224. 131st. 224. 132nd. 224. 133rd. 224. 134th. 224. 135th. 224. 136th. 224. 137th. 224. 138th. 224. 139th. 224. 140th. 224. 141st. 224. 142nd. 224. 143rd. 224. 144th. 224. 145th. 224. 146th. 224. 147th. 224. 148th. 224. 149th. 224. 150th. 224. 151st. 224. 152nd. 224. 153rd. 224. 154th. 224. 155th. 224. 156th. 224. 157th. 224. 158th. 224. 159th. 224. 160th. 224. 161st. 224. 162nd. 224. 163rd. 224. 164th. 224. 165th. 224. 166th. 224. 167th. 224. 168th. 224. 169th. 224. 170th. 224. 171st. 224. 172nd. 224. 173rd. 224. 174th. 224. 175th. 224. 176th. 224. 177th. 224. 178th. 224. 179th. 224. 180th. 224. 181st. 224. 182nd. 224. 183rd. 224. 184th. 224. 185th. 224. 186th. 224. 187th. 224. 188th. 224. 189th. 224. 190th. 224. 191st. 224. 192nd. 224. 193rd. 224. 194th. 224. 195th. 224. 196th. 224. 197th. 224. 198th. 224. 199th. 224. 200th. 224. 201st. 224. 202nd. 224. 203rd. 224. 204th. 224. 205th. 224. 206th. 224. 207th. 224. 208th. 224. 209th. 224. 210th. 224. 211st. 224. 212nd. 224. 213rd. 224. 214th. 224. 215th. 224. 216th. 224. 217th. 224. 218th. 224. 219th. 224. 220th. 224. 221st. 224. 222nd. 224. 223rd. 224. 224th. 224. 225th. 224. 226th. 224. 227th. 224. 228th. 224. 229th. 224. 230th. 224. 231st. 224. 232nd. 224. 233rd. 224. 234th. 224. 235th. 224. 236th. 224. 237th. 224. 238th. 224. 239th. 224. 240th. 224. 241st. 224. 242nd. 224. 243rd. 224. 244th. 224. 245th. 224. 246th. 224. 247th. 224. 248th. 224. 249th. 224. 250th. 224. 251st. 224. 252nd. 224. 253rd. 224. 254th. 224. 255th. 224. 256th. 224. 257th. 224. 258th. 224. 259th. 224. 260th. 224. 261st. 224. 262nd. 224. 263rd. 224. 264th. 224. 265th. 224. 266th. 224. 267th. 224. 268th. 224. 269th. 224. 270th. 224. 271st. 224. 272nd. 224. 273rd. 224. 274th. 224. 275th. 224. 276th. 224. 277th. 224. 278th. 224. 279th. 224. 280th. 224. 281st. 224. 282nd. 224. 283rd. 224. 284th. 224. 285th. 224. 286th. 224. 287th. 224. 288th. 224. 289th. 224. 290th. 224. 291st. 224. 292nd. 224. 293rd. 224. 294th. 224. 295th. 224. 296th. 224. 297th. 224. 298th. 224. 299th. 224. 300th. 224. 301st. 224. 302nd. 224. 303rd. 224. 304th. 224. 305th. 224. 306th. 224. 307th. 224. 308th. 224. 309th. 224. 310th. 224. 311st. 224. 312nd. 224. 313rd. 224. 314th. 224. 315th. 224. 316th. 224. 317th. 224. 318th. 224. 319th. 224. 320th. 224. 321st. 224. 322nd. 224. 323rd. 224. 324th. 224. 325th. 224. 326th. 224. 327th. 224. 328th. 224. 329th. 224. 330th. 224. 331st. 224. 332nd. 224. 333rd. 224. 334th. 224. 335th. 224. 336th. 224. 337th. 224. 338th. 224. 339th. 224. 340th. 224. 341st. 224. 342nd. 224. 343rd. 224. 344th. 224. 345th. 224. 346th. 224. 347th. 224. 348th. 224. 349th. 224. 350th. 224. 351st. 224. 352nd. 224. 353rd. 224. 354th. 224. 355th. 224. 356th. 224. 357th. 224. 358th. 224. 359th. 224. 360th. 224. 361st. 224. 362nd. 224. 363rd. 224. 364th. 224. 365th. 224. 366th. 224. 367th. 224. 368th. 224. 369th. 224. 370th. 224. 371st. 224. 372nd. 224. 373rd. 224. 374th. 224. 375th. 224. 376th. 224. 377th. 224. 378th. 224. 379th. 224. 380th.

Bailment

In this case then, the authorities are abundant & directly harmonize with the principle. It follows therefore, that where the loss is occasioned by Robbery the bailment is prima facie excusable, & the bailee may subject himself for any loss by breach of trust or fraudulent exposure; and in the former case, if the degree of care required of any bailee, does not exceed ordinary care, he is excused from liability by robbery, & contradistinguished from theft. 2 Salk 522. 2 Ray 916-17. Jones 261. 107-11.

In Southcotes' case, it is laid down that the bailor is not liable for losses occasioned by bare theft & the reason assigned is the same as that urged to show that he is liable only for gross neglect viz. his having the property or property in the goods & is therefore bound only to keep them as his own.

Sir W. Jones holds unconditionally the bailment is liable for theft, & his reason is as out-
rapours as Lord Coke's. He says that "the bailment cannot be considered as requiring such diligence, where he has suffered the goods to be taken from him by stealth." 4 Co. 53. Contra Jones 106 7. 106. 7. 8.

But Sir W. Jones flatly contradicted himself, & will not admit the analogies of the same. It is not true in fact that ordinary care will protect goods from theft & it is contrary to general experience to say that rational men of common prudence do not suffer by theft. It is a question of fact whether "Ordinary care" were used or not & this must determine the bailor's liability. - Lord Holt places the case of loss by theft on this footing. As a factor who is excused, if he use reasonable, i.e. ordinary care.

Indeed Sir W. Jones himself says that in common datum the borrower is liable for mere theft, unless he shows extraordinary care: thus admitting, that there may be theft even where extraordinary care has been used. 2 Ray 917 18-19. 121. 1. 2. Co. Cont. 252. Jones 92. Salk 522.

The Pawnee going like other bailies a qualified property in the thing bailed. But this interest is defendable by payment. It is determined by payment, or by Tender, which for every purpose of vesting the property in the pawnee is equivalent to actual payment made & recd. 1 Bac 237 8. 8 Bro Jas 244-4 Co. 83^b. Bull 40. 72 - 110. 179 Jones III. 12. 102. 27.

If then payment or Tender is made & afterwards the Pawnee demands restitution on the day appointed for payment & the Pawnee refuses to deliver, he is guilty of a breach of trust & is liable in damages for every loss or injury the property may sustain while in his possession however it may be occasioned. As by Lightning, Tempest &c. Salk 523- 2 Ray 917- 2 Esp. D. 625- 4 Co. 83^b. 10 Ann. 253.

^c And on pawnee's refusal to deliver the goods on payment or tender & demand of restitution the pawnee may immediately maintain Trover ^{upst.} ^{hence} ^c And that rule is the same if the refusal be made by the pawnee's clerk, agent or servant acting regularly in the course of his employment for this amount to a conversion by the pawnee himself, agreeably to the maxim "*qui facit per alium facit per se*". Indeed if it were not the regular business of the agent to re-deliver such article the principal would not be made liable by the refusal, for it would not make the Master a wrongdoer. Bro. Jas. 224 Salk 441- Moore 841- Jones III. 126.

In this case however the pawnee may have his election, between the two actions, Trover & Assumpsit. The breach of trust is the foundation of the action of Trover, and the breach of an express or implied contract founds Assumpsit for by a Bailment the Pawnee either expressly or impliedly engages to re-deliver or pay. Bull 72.

But it seems he cannot maintain either of these actions without tendering or paying all that is due lawfully the principal & legal interest, even when the payment was made on an insurance bond. for these actions on the case are founded on equitable principles, altho a ten-

in some cases nothing is done, and in some cases the law is not settled. It is a matter of dispute as to whether the law is settled or not. See 124 153.

Bailmt

I refused to deliver property pawned, on May 1st 1853. It is a debatable offence at law. This rule is not general as to a breach of trust merely, they being deemed Civil Injuries only & not offences. On this point there are diff. opinions but the law seems well settled. 5alk 522-3 Hb. 309-Par 277-1 Bac 240-2 Hawk 210.

This rule is ob.

viously a mere rule of Policy for it is clearly that a breach of a trust between Pawnor & Pawnee is no more criminal than between any contracting parties. The object of the Rule is to guard the Pawnee from Fraud & Oppression, the danger of which is greater in this than in any other species of Bailmt, in as much as the transaction is generally secret, so that the Pawnee is enabled to conceal the facts. Besides the Pawns are delivered by persons who are necessarily & embarrassed, who of course are the most open to fraud & Oppression. - These I take to be the true ground of the Rule.

It seems the Pawnee may in some (in some) instances use the pledge where the use may be profitable & in others he has not this right. This right when it subsists is said to be founded on the pawnor's consent expressed or implied, or presumed. I have doubt as to the foundation of the right in all cases. For the presumption of consent is said to exist or not, in general, as the thing is likely to be made worse or better or not affected at all by the use.

A case in which a Pawn can be made better by use can seldom occur. Sir M. Jones supposes a pawnee of a set ting dog which is confined to useful habits by exercise. & so there might be a case where the chattel pledged for a long time as a horse to be kept thro the winter or year might be benefited by use of moderate moderation - This however would be allowed on another principle. Jones 112-13.

And it seems agreed that when the thing pledged is of such a kind as not to be injured by use, the pawnee may use it,

If then Pawnee should lose the goods & when the law Bailmt. does not allow the pawnee need not redeem nor wait until pay day arrives, he may commence his action immediately.

Lord Holt says the rule is the same with respect to goods found & to the liability of the finder it is very much the same but the finder has no lien upon the goods as the pawnee has; the same diligence however is required of each. see Mr. Powell says the finder is bound to use ordinary diligence in keeping the property for the true owner. 2d Ray 917-1 Par. 252.

There is a case in Woolley in which it is said a finder of goods is not bound to keep them safely & is not liable at all for negligent keeping. This I think cannot be law nor is it tenable on principle. It is a mere dictum; the determination of the case is doubtless right but the reasoning is erroneous. Woolley 219-1 Esp. D. 599; 2 B. & W. 21-1 Bro. 123-1. All these authorities agree that he is bound to use ^{ordinary care} & is ~~not~~ subjected for negligent keeping.

Now it would seem on the first impression that a finder ought not to be subjected for anything but gross neglect for the sole benefit of his possessor & access to the owner. The finder cannot compel the owner to pay him for his trouble. The finder here appears like a Depository.

But in case of a Deposit the Bailor delivers out the goods or not, as he pleases. A depositary knows his man or ought to know him; this is not the case with goods found which of course cannot be said in strictness to be bailed & it seems that the finder ought to use ~~extraordinary~~ ordinary care or leave the goods for some one to take, who would be honest enough to do it.

The Stat. law of Ct. enables the finder to recover compensation for trouble &c. here then the finding is clearly advantageous to both parties; the finder then is bound to use ordinary care

from the first principle admitted. May 1856. In it is
 W. then with the question & whether it throws the risk
 on the owner. Provided the finder is faithful, which I
 think imports that he is of an ordinary care at least.

I find & take the G.L. rule to be the same. The reasoning in
 Crook v. [?], is apt, it is not an action of trover nor the find-
 er for profits which had been first found & spoiled in the hands
 of the finder he negligence, as it was alleged. On demurrer it was
 held that the action would not lie. The decision was right for clear-
 ly an action of trover will not lie for a bare non-jealousy it
 must be a positive wrong; The gist of trover is conversion but
 the dicta of the Court in that case are not law. Bro. & C. 219-86.
 146-5 Burr 2827- Rob 251 2 P.D. 590. The Court said the finder need use no care.
 5 Bae 269.

It is well settled at C.P. that
 a finder has no lien upon the goods found, for his trouble & expense
 but upon demand made by the true owner with evidence of own-
 ership, he is bound to deliver & if he does not, he is guilty of a
 conversion & liable in trover, for as before observed he has notice.
 2 Bl. 117- 2 H.B. 254- 6th 65. 2 Bl. R. 117.

Now the case of salvage is diff. where the goods
 are wrecked or lost or abandoned at sea, the finder is entitled to
 a reward; but this depends upon the public Maritime law
 & not upon any rule of the C.P. 20 Ray. 293- 2 H. Bl.
 254- 5 Bae 270.

But altho it is agreed that the finder has no lien upon the
 goods it has been made a " moot Question" whether at C.P. he could
 in any way recover a reward. If he can it must be by an
assumpsit for work &c founded on an implea-
 tion of request & promise. Now the law will imply a promise,
 but not a request, for there is no privity between the parties;
 the finder's act is founded in courtesy; now I confess, that I
 do not discover room for a recovery; there is nothing in the
 nature of a contract express or implied, 2 H. Bl. 258. As to
 voluntary courtesy *vid* Rob 106. 2 P.D. 86. 95. I am strongly inclin.

ed to think that there is no remedy for the finder. If the owner has not honestly & in good faith sought to find the finder must lose his reward.

But a refusal by the finder to restore the goods on demand is not, of course, considered; it is not, unless there is evi. of fraud or shift exhibited, for if it were he might be forced to deliver it to the first applicant; the rule is, that if on demand & evi. of ownership, he refuses to deliver he is to be subjected. He then is made the judge as to the evi. & the question whether it was reasonable or not, is included in the issue which goes to the Jury. 2 Dals. 312 Esp. D. 590.

But there is one case, not decided in the books to my knowledge viz: a finder of goods which actually belongs to B. demands them & on refusal brings an action & by false testimony recovers the full value of a £. Then D. brings his action agst. C. & C. can he recover? (See "Most Rep. or Questions.") It was decided in Ct. that C. might recover, but ~~some~~ Court think it not law, & consequently as the goods have been once compulsorily taken from him, the Judge may be justified. There are however some analogies to the case which do not however relate to the finding. 3 J. R. 125 2 Burr. 11. Long. 161 1 ABl. 669-682. 2 B. 400. Most 545. Cook. B. law. 370. The reason given in favour of Ct. decision was that a Judge presiding L & H. could not be placed in a position to give an action by B. Court says it can in this case.

as returned to the subject of pawns: If on tender of the pawnor & refusal of the pawnee to deliver the pawnor recovers in Trover; the pawnee may still recover by action his own Debt, notwithstanding his breach of Trust. he must first however demand the money tendered. 1 Bul. 29. 31. 1 B. ac 238.

If perishable goods are pawned & they decay, the pawnee is not to lose his debt for this reason, because the pawnor neglects to redeem, he may still sue & recover, for the Debt or Duty remaining, tho' the price is lost.

Indeed it would be gross injustice in most cases to make one answer the other, for the pawn is sometimes of only half, tho' in general it is double the value of the Debt, and the law has given the parties mutual rem.

Thus the Pledge is never a satisfaction, but a security for the Debt, and acc't. below.

However great may be the misconduct of the pawnor, he is still entitled to recover his debt; ^{on the} ~~caution~~ the pawnor may recover for the loss of his property & thus complete justice is done; each party recovers what he ought to recover. 1 Inst. 573-1 Inst. 209. 12th. 179. 1 Inst. 235.

And while the pledge remains unimpaired in the hands of the pawnor, he may sue for his debt & recover it, unless he has qualified his right by an agreement, that he would rely on the pledge alone; for the Pledge alone does not satisfy the Debt. 1 Inst. 573. 179. 2 Inst. 116. 465. p. 706.

If the Debt for which the Goods are pledged is not paid at the time appointed the property is absolute at Law in the pawnor, & is gone forever from the pawnor. The principle is the same, as that of a Mortgage; the Condition broken & the title absolute at Law. In England however, the right of Redemption is not gone in analogy to the Law of a Mortgage. 1 Inst. 106, 1 Inst. 205. 2 Inst. 691-8. 3 Inst. 375. 1 Bac 238.

It seems to me however that this Equity of Redemption, can only be exercised when the property remains specifically in the pawnor, or is assigned by him as a pledge, for having absolute property he must have a right to sell, & if sold I should not think the pawnor could redeem. 1 Inst. 114.

A distinction is to be observed between a Pawn and a Mortgage of a personal chattel; here the Mortgagee has a general property & there is no equity of Redemption after the day of payment, i.e. forfeiture. It does not create a mere lien as a Pawn does. 1 Inst. 96. 5 Inst. 258. 1 Inst. 578.

But in case of a Pawn, property so called, this right of Redemption exists after forfeiture altho' it might have been agreed at first, that if the property was not redeemed at the time, it should be considered as sold in analogy to the Law of a Mortgage. "Once a Mort. always a Mort."

as the mortgage applies equally well to Pawns. This mortgage does not express the principal it means however, that if the property is conveyed as a security with a right of redemption, no collateral agreement made at the time shall cut off the right of redemption. This rule is intended to prevent oppression & to guard persons embarrassed in distress from the hard & unreasonable conditions which mortgagees might impose on them. 2 Vern. 690. 1 Bac 138. 1 MBl. 114.

Bailment

A Factor cannot pawn his principal's goods so as to give the pawnee any lien ag^t the principal. 11d. Lit. Master & Servant.

The reason is that the Factor has not a lien & that is a personal right which cannot be transferred; the Contract creating it is a fiduciary contract; the principal is willing to trust the Factor & give him a lien until his accounts are settled, but he does not give him a right to select a new keeper - And it is now settled that if a factor pledges his principal's goods to secure his own debt, the principal may sustain trover after demand ag^t the holder, & without tendering to the Factor the debt due him, the act of pawning is a breach of trust by which the Factor forfeits all his own rights. 11th 118. 5 MBl. 604. 1 MBl. 362. 7 East 5. This case decided the quesⁿ that tender need not be made to the ~~owner~~ holder or assignee.

On failure of payment at the day the pawnee is at liberty to sell the pledge for the title is absolutely vested in him at Law. 1 Ins. 205.

And according to some opinions he may sell or assign the pledge before the day of payment. Owen 124. 1 Buls. 29. 31 1 Bac 239. But these opinions for numerous & decisive reasons cannot be correct. Every Bailment implies a Contract strictly fiduciary & Justice Butler observes that a Lien is a personal right, i.e. a right annexed to the person & not transmissible; & Lord Ellenborough expresses the same opinion, & a doctrine of the same kind is deducible from the other cases. Cro. Jac. 244. 1 W. 1. 5 MBl. 606. 7 East 6.

Now the decision on this point one way or the other is practically very important. For if the assignee be forced to pay, it is not legal, it follows that the pawnor need not tender to the assignee, but may claim immediately of the pawnee & besides the pawnee is exposed to a wrongful & unjust conversion & said further it appears contrary to the analogies of the law, that a Pawn should be thus assignable. It is clear that the pawn cannot be forfeited to the King or Public by pawnor's act as in *Reason or Solano* 10 Bac 238. But a man may thus forget what he is capable of conceiving in his own right. 1 Jus. 8. 12 Co. 12. b. d. 556. 2 Bac 376-7.

It is also laid down by Brooke (a good authority) that a ^{before day of payment} Pawn cannot be aliened meaning plainly "assigned". Rule cited in 14 es. 359. 11 Bac 238. 1 Jus. 8. 12 Co. 12. b. d. 556.

Again it is settled that a pawn cannot be taken in *Exon*, because the interest of the Pawnee is of such a kind as to render it dangerous to the rights of the pawner to allow the pledge to be thus taken. 1 Bac. 238. 24 Cr. 460. Owen 124. 11 Bac 352.

I think it must be clear from these analogies & principles that a Pawn cannot be assigned before day of payment. & a Pawn is in the nature of a personal trust & if the pawn could be assigned, the pawner would be in a dangerous situation, for if the assignee should become a Bankrupt & the Pawn be lost thro' his fraud or misconduct, the pawnee could not resort to the Pawnee, & the principle is same with servants.

& said this is the principle that governs all fiduciary contracts wth property. The case is diff. from that of a Mortgage; for land cannot be embroiled & Mortgagee's Insolvency or Ruin cannot prevent redemption. But a chattel may be run away with, destroyed or embroiled.

There is a case in the 2. Vent. 41-8, which seems to show that a Pawnee may assign a Pawn before the day of payment. The case was; A. Pawned to B. who directly after before the day of payment, pawned the same goods to C.

A bill to redeem it was decided that he should pay the same due amount to C. It is also observed that this bill was not after the forfeiture when the equitable origin of the assignee was precisely the same as if the assignee had been after forfeiture. To have revived the question under discussion if the action was not, so late, it should have appeared that there had been a transfer at the time, or the action should have been ^{or assignment} ~~revived~~ & not immediately. So that the point is undetermined in that case.

But on the other hand, the pawnor may forfeit his right (his right) to the pledge by treason or felony or any other crime which makes a forfeiture, but the king or public cannot take the pledge from the pawnor, unless the pawnor has received his debt. For the interest of the pawnor is but the right of redemption which is forfeited. 1 Bac 238. 1 Bul. 29. Nolo. 179.

I trust, then, that the fairest construction is, that the Pawnor cannot assign before forfeiture or the day appointed for payment.

It was anciently deemed essential to a pawn that it should be delivered at the time the debt accrued which was intended to be secured by it & it was held that if delivered afterwards it was not a pledge, but a licence to encumber a trespass in taking it, to be retained during pawnor's pleasure, which he could if cause was shown, recover. But this is not law. For it is settled that a pawn may be delivered upwards after the time of debt contracted or accrued. 2 Leon. 30. 1 Bac 238. Nolo. 164. Hod. 358. 1 Bull 38. 1 Mod 65. Esp. Dig. 570.

It was formerly doubted when no day of payment was fixed, whether payment or tender would vest the property unless made during the joint lives of the parties. It was settled however that it might be made at any time during the life of the pawnor. 1 Bac 239. 1 Bul. 29. Nolo. 179. Co. Litt. 24. 5.

And the question has been made whether if in such case the pawnor has assigned the pawn for a good cause to a third person, as a gift, during the pawnor's life, the pawnor on the death of the pawnor is to pay or tender to the pawnor's estate or to the assignee. This question depends entirely upon another one before mentioned viz. Whether the pawnor can legally assign a pawn before the day of payment? As the rule in such case is, that the pawnor is at liberty to redeem it at any time during his own life, if it is assignable before forfeiture payment is made to the L. if not to himself &c. If my view of the subject be correct, payment is to be made to the L. if the pawnor is not to L. 12 Geo. 1. 11 Mod. 29. Crof. 244 - Mac 2304 Com. D. 239

But when no time is fixed for payment, the pawnor must be redeemed by payment or tender during the pawnor's life, otherwise it is forfeited, so that he cannot claim the right of redemption at law, for after forfeiture no legal claim can be made by him or his representatives. (Bul. 29. Crof. 244 Mac 239. 12 Geo. 1. 11 Mod. 29.)

You will perceive that the Rule that extends & fixes the time of redemption to the life of the pawnor when no time is fixed by the parties, is a baseline one. But the establishment of some precise time is not arbitrary; general convenience requires it; without it the contract would be uncertain, indeed, never accomplished; & if the pawnor said no other person, the pawnor might in effect be defrauded, for he never could dispose of the pawn.

But when the law thus limits the redemption to the pawnor's life, I trust there is a right of redemption after his death in equity, unless an agreement to the contrary be clearly made. There is no precise authority to this point, but it is laid down in a note in Bacon (I presume it is correct) that an equity of redemption remains after forfeiture, when the time is fixed by the parties; and I see no reason why it should not be the case, when fixed by law. Mac 239.

When there is a day appointed for payment by the parties

The pawnor's interest is not forfeited by his death before the day arrives; the Right of Redemption is transmitted to his Ex^{ors} (Bailm^t)
1 Buls. 29 - 1 Bos. 239.

Vth Delivery with a Reward

This is a delivery of Goods to be carried or some other act to be done about them for a Reward to be paid the Bailee. It includes a delivery to private Carriers, or other private persons on the one hand, & on the other persons, who are in the exercise of some public employment, as common Carriers, Inn-keepers &c. Doct. Ray 917 - Jones 132. 44 - 1 Bos. C. 253.

The consequences of these two different kinds of Bailm^t are so different that I shall treat of them separately.

Ist Of Delivery to a person not exercising a public employment as Sailors Factors, Common Agents, Clerks, Bailiffs &c.

Now a delivery to a private bailee may be to one in a private professional character, as a Shoe-maker Tailor &c., or to one pursuing no particular employment or profession Doct. Ray 918 - Jones 50 - 128-9.

A Bailm^t of this kind includes a delivery to an assisting Farmer, i.e. one who pastures the cattle of another; if he takes care of them, he is bailee of the 5th Class.

This Bailment is advantageous to both or intended to be so & is so in presumption of the Law - according to principles & authority it is well established, that a bailee of this class is bound to use ordinary care only & is to be subjected for nothing less than ordinary neglect. 1 Roll 4. - Doct. Ray. 918 - 1 Bos. C. 254 - 12 C. Mod. 487 - 1 Ken 121. Jones 14 - 22 - 31 - 120 - 31 - 8.

A private bailee of this class is prime facie excused in case of Robbery, i.e. the rule relating to him is the same, & he is liable to the exception as in the case of a pawnor or Lirer, if he is, ⁱⁿ no fault he stands excused. Jones 129 - 130-8.

And the rule is the same of all private bailees

it should be. & if this were so, it cannot be a Bailment, but a Mortgage, being similar to a loan of Bread or of Grapes to be made into Wine, or of Flour for bread 2 Bl. 404 - Pop. 35.

It seems difficult to deny the correctness of this artificial reasoning & yet I never could be satisfied - Clearly the parties intended the property should be altered. But if the fact can be ascertained that it is the same I confess I do not see why bailor should not bear the loss if ordinary care were used, & if the property remained as it was without fusion the case would be still stronger. Sir W. Jones however gives the same right, & liabilities immediately on delivery, as after fusion, founded on the intention of the parties.

Such a rule of law would bear extremely hard on that class of men, if it were followed thro' & the hardness I think would strike a Court so, that the artificial technical reasoning must be very strong to induce them to follow it. This is still a "Host Question".

When the bailee is to do some act of skill in his professional business or character for him, the law implies a two fold contract viz: that he keep & redeliver using ordinary care & also he is to do the work skilfully, i.e. he is to use all necessary skill, vid post 228.

But if not in the line of his business the law implies no engagement that the act or work shall be done skilfully. In this case therefore he cannot be subjected, unless there is a special agreement. Thus if Cloth be delivered to a Blacksmith to be made in to a garment & he ruins it, bailor has no remedy, unless there were a special undertaking; it was the bailor's own folly & the case comes within the maxim that "the Law will not assist Fools & Idlers" 1 Bl. 158 - 11 Co. 54 - 3 Bl. 165-6 - 1 Saund. 324 - Pop. D. 601. Jones 128-9 - 137 to 140.

If Goods, delivered to a bailee of the 5th class, are lost or destroyed thro' want or omission of requisite care before the act, he contracted to do about them, was finished; it is an incidental question, whether he can recover pay for what he has done.

I see no room for doubt, it is clear he is liable for the loss of the property, the bailee is not benefitted by the labour, & it was the fault of the master that he was not: the objection might be in vain. It is not the dictate of common justice that he should answer. Besides it would be inequitable for if he were to answer for the labour, the bailee in his action for the goods or their value, might of course take advantage the value of the goods, as increased by the labour. 3 Burr 1399-5. Esp. D. 86.

IInd Bailments of the 5th Class, also include a bailee to a person who exercises some public employment, as a Common Carrier. See Chapter X.

IInd A Common Carrier,

A Common Carrier is any person in general who makes it his business to carry the goods of another for him, as a common Porter, Carman, Wagoner, Boyman, Ferryman, Shipmaster, &c. 2d Ray. 918. Jones, 149, 151. 1 Co. 84.

It was formerly doubted whether any other than a land-carrier was a Common Carrier, but it is now settled to be immaterial whether the transportation be by land or water. Lib. 17-18. Brogden 330. 12. Mod. 257. The law was first extended to common Barges in *Car. I.* & to Shipmasters in *Ch. 2.* Jones 149-153.

Owners of Ships, employed in carrying goods for others are considered as common Carriers & in case of a loss an action may be brought against either the Master or the owner. 1 T. 618-78. Salk. 240. 3 Dec. 257. *Car. 62.* 1 Show. 27-101. Esp. D. 623.

Drivers of Waggons are not liable, unless they are also the owners. There is a st. in England. 7 Geo. 2., limiting the liability of Ship-Owners to the value of the ship & freight when loss is occasioned by the navigators. This is not Ch. & does not affect us. 1 R. 18. 70. And 26 G. 3. subject them no more in case of Robbery.

If a Common Carrier, having the convenience to carry goods & some are offered him & he refuse to take them when the hire is tendered, he is liable in an action on the case.

to the party offering, for the law imposes a constraint on the part
of Common Carriers to carry all goods offered to them as the pub-
lic calculate upon them & they cannot successfully refuse.
their duty is like that of an Innkeeper who cannot refuse to
receive a guest without such cause. 1 Mac 321 - Bull 7 -
2 Show 327 - 3 Bl. 166. - 3 Mac 100.

But a Common Carrier is at liberty to make
a special acceptance. Conditional - eg. that he will not be
answerable for specific articles as money &c. unless
he is notified of their being contained in the parcel &c. & is paid
according to their value. And he is not liable as Common
Carrier, unless the condition is complied with. It is very rea-
sonable for he ought to know how to appraise his diligence -
the greater the value, the greater the risk. 4 Burr 2290 -
Esp. 622. 3 Bl. 165. n. 7.

A Common Carrier however cannot impose
what terms he pleases, or such unreasonable ones as destroy
his liability, & not to be liable for neglect or robbery, or losses from
a Ship's being unseaworthy. These conditions would but prepare
a subterfuge for Ruin. 4 Burr 2290 - Esp. 662.

A recent case in which a Stage Driver was
joined for only the carelessness of the driver of the stage between
N. York & N. Haven, occasioned him to advertise that he would
not be accountable for the negligence of the driver employed by him.
Such a condition could not be enforced & the notice will not avail
him. The effect is the same & no greater, than if he should publish
that he would not be accountable for his own neglect or fraud.

This kind of Bailmt. being advantageous to
both, if there were nothing to impede the operation of the law, but
the Common Carrier would be bound to ride ordinary care only
& could be subjected for nothing less than ordinary neglect &
it was holden in the time of Hen. 8. that Robbery excused him
Jones 144. But it was settled in the reign of Eliz. that Robbery
was no excuse 4 Co. 84. 1 Roll 2 - Jones 144. 5 - 1 Mac 245.

And the Rule now is that he is liable for loss occasioned in any way except by the act of God, Public Enemies - (Inevitable & accident) or by the act of the Sailor himself. 2 L.Ray. 910 - 2 L.Ray 1593 - Bull 70-1 - 15 L.R. 27 - 12 East 609 - 1 Dora 253 - 11 L.R. 201 - 1 L.R. 18. 3 Bl. 165. n.7.

This was not the original rule at C.L. the true foundation of it is public policy, which works an exception for by the then Law Rules introduced at the commencement of this title where the "Sailor" was mutually advantageous to both the bail, & liability was limited to ordinary neglect; but public policy requires a more extended liability. For the exigencies of a Commercial people require some persons to act as common carriers & that the public should have confidence in them. As now man has become a common carrier the Law ought to make the sailor so too. The danger of such persons & not the connivance with robbery & piracy for the opportunities of demanding will be numerous that the law imposes a higher liability than strict justice between man & man would require. 2 L.Ray 910 - 15 L.R. 34 - 1 L.R. 143 - 12 East 610.

In *Southey's case* 2 L.Roke says that the proceeding a common carrier liability is that he has a reward. It is not so for the reason is equally applicable to a private carrier or any other indeed, where the liability was mutually advantageous it is true that if the sailor has no reward he is not liable for in such case he does not act as a common carrier & of course cannot be subjected as such. 1 L.R. 455 - 1 East 604 - 12 East 621 - 4 Co. 84. *Jones & 145.*

You perceive then that a common carrier is in nature an insurer not an insurer but the act of God, Public Enemies or of the Sailor himself. 3 Bl. 165. n.7.

By the "act of God" according to Lord Mansfield is meant an act which cannot happen by the intervention of man, as earthquakes, lightning, inundations &c. 1 L.R. 33 - 1 L.R. 128. *Valerius &c.* 3 Bl. 165. n.7.

Fire, occasioned otherwise than by Lightning is not a Bailment
deemed the act of God. 156 34 - 24/36. 113 - 2p. 8. 620. Fire in London.

And it has been determined that a Common Carrier by Water is not excused by a Rat gnawing a hole thro' the Ship & occasioning loss or damage. Sir W. Jones says ordinary care will prevent such loss; this I should doubt. Still it is not inevitable accident within the Rule 1 Wils. 281 Bull 70 - Jones 147.

A Common Carrier is not excused by the act of more
 & more Insurgents, or Rebels for they are not public enemies with
 in the rules. But when a loss is occasioned by pirates he is ex-
 cused, for such are deemed enemies of Civil Society. 1 Dou-
 239- He is not excused by what are called fresh-water Pirates
 that infest Rivers, Harbours &c, they being not regarded as
 Public enemies. 1 Tr. 18. 1 Vin. 196-1 Mod 85- Exp. D. 620. ^{as appears to this} 7 ^{years} 4
 The case in London by D. Geo Gordon Shickelbury & Co. of the Galley in London.
 Parliam. had to make a Special Act to discharge Ships from liability &c. 112 page 58.
 as it is made necessary in the case of a good & system
 (next) to throw on the shoulders of the Common Carrier the entire
 damage for the necessity is inevitable for the immediate relief
 by the Carrier. 2 Roll 507 2 Roll 579 2 Bats. 280- Jones 157 Exp. D. 20.

There is a case (in c. 4400) where the common carrier was made liable for throwing a box of tools overboard. The case is badly reported & the probability is that there was no need of throwing it over; we should suppose a box of that kind to be so light & this was probably the ground the lawyer set upon. The *Quintus* is well settled.

When the Goods are Thrown overboard necessarily the Owners, Master, Freighters & passengers must average the loss among them; the claimers are not included. This is a rule of the House Merchant & not a B.S. rule. 3 Bac. 294-5 - 1, East. 220 - Beaves Dig - ch. 148 - 254.

But if a Common Carrier voluntarily & unnecessarily exposes the goods to danger from inevitable accident & doubtless from Public enemies, he is not excused. As where a Hayman voluntarily puts to sea in tempestuous weather where a loss was probable, here he would be liable, altho' the immediate

proximate cause was inevitable accident. 128. The same was admitted in *St. v. Carr* Williams & Grant in error. 620.

A Common Carrier is excused according to the exception to the Gen. Rule when the loss is occasioned by the act of the Bailor himself, thus where an action was brought for the loss of a pipe of wine occasioned by bursting. It appeared at the Trial the wine was in a state of fermentation when sent, this having occasioned the bursting the Carrier was held not liable it was the act of the bailor in sending it at an improper time. Bull 690 74 - 2 Esp. 8. 621.

And again, the Waggon of the Common Carrier was full & the bailor forced the goods upon him & a loss was occasioned by overloading, the bailor was excused on the ground that it was the fault of the bailor. 2 Show 127 - 1 Bar. 344.

But in order to charge the common carrier to the extent of the Gen. Rule, the goods must have been lost while in his possession or under his immediate care & control. For if the owner sends a servant with the goods in a vessel to have the control of them & they are stolen the carrier is not liable, i.e., as a Common Carrier, for he does not act as such when the goods are under the control & guardianship of another. 2 Esp. 621 - Bull 70.

Still however if the loss were occasioned by the actual fault of the bailor, although the goods were committed to the immediate care of another, the bailor would be liable; as if they were lost by the vessel being not seaworthy, or the misconduct or negligence of the seamen. 2 Show 327 - Bull 70. 1 Bar. 344.

But where goods were delivered to a Common Carrier & a passenger was requested to take the oversight of them, the carrier was adjudged liable for a loss; for a mere request, like that to look after the goods does not deprive him of possession or control over them. Cro. Jac. 330 1 Roll. 2 Hob. 17.

And it seems that a Common Carrier, tho' ignorant of the contents of a Box or Parcel, is liable for the goods in case of loss unless he discharges himself by a qualified acceptance or some condition excusing him. Bull 70 2 East 128. Stra 145. Cur. 285. Jones 148. 1. Bac 345.

If such condition is prescribed & bailor does not comply wth by information the bailor is either not liable at all, or only to the value of what is specifically accepted.

It will doubtless be remembered, that, questioning the propriety of the rule making the Depository liable, when he did not know the contents of the parcel, unless he were grossly negligent as to the parcel.

Still, I think it that the Rule just laid down, as to the common Carrier's liability in such case is strictly correct; for here the liability is mutually advantageous to bailor & bailee & the Common Carrier's liability does not depend upon the degree of care or negligence (he may use); the nature of the goods then cannot affect his liability & if he is willing to run the risk & accept unconditionally, he ought to be liable; so that the rule appears correct.

There are two cases in which it was determined that a Common Carrier was liable when he was misinformed as to the contents of the parcel by the owner, unless the acceptance was special & in both the cases the owner intended to defraud the carrier, which the Ch. Justice observed might go in mitigation of damages. Allen 93-14 ex-238- Bull 70- 1 Bac 345- 2 Tob 135- Dost 4 Stud 130-

In both the cases the owner misrepresented for the purpose of diminishing the Hire. - These decisions appear to me contrary to principle. They are pointedly disapproved of by Lord King & Mansfield & may now be regarded, I trust overruled. These Judges say that the Common Carrier ought to be excused on the ground of Fraud. And perhaps the case would come within the Third exception to the Gen. Rule, being a loss occasioned by the act of the bailor. 4 Burr 2300- 1 East 610- Jones 148- Stra 145-

I want to just observe for the purpose of making special

and it is not necessary that there should have been some at
some distance between the parties; a notice in the Public News
paper of the terms on which the Common Carrier engages to trans-
port may be sufficient. I say "maybe" for it may not be said when
the Common Carrier depends on the grounds of the special ac-
ceptance & notice given & not complied with, the law may infer
from such advertisement that the owner had notice; it does not
per se screen the Carrier. But if it appear that the owner had no-
tice the jury will so find. The Publication is quite matter of Evi-
dence. 4 Burr 2290. Car 485. 14 Bl. 290. Ball 71. 25 Q. B. 622.

You perceive from the Rules already laid down,
that under a gen. acceptance, except in cases of fraud, a Com-
mon Carrier is liable to the full amount of the goods recd. & it is
he may not know the value of them; but when he accepts the
consign. he is liable for so much only as his Receipt extends to. Thus
where a Bag delivered to the Carrier was described as containing
only £200 when it actually contained £400. he was liable only
for the £200. Car 485. Ball 70-1. 12 Q. B. 621.

And where a Common Carrier published that he
would not be answerable for certain valuable articles at all, such
as money, jewels &c. except on certain conditions & they were not
complied with, & tho' known to the bailor. The Carrier was adjudged
not liable at all; as when the condition is of being informed of the val-
ue & he was misinformed. This case is diff. from the former, there
the Condition was that he would be liable only to the amount he was paid
for. here the Carrier says he will not be liable at all, unless inform-
ed. 10 Co. 104 Bl. 290. - 8 Q. B. 622.

The Master of a Stage Coach who receives hire for
Passengers but not for baggage is not liable as common Carrier
but if he carries goods for hire he is thus liable. Com R 25. La Bk;
282. Ball 70. 4 Q. B. 622-4-2. How 128. 11 Bac 344. Could doubt this point if
fullest extent - he thinks he ought to be liable & here he binds up his goods as Stage Coach.
And a Common Carrier is liable according to
the distinctions here taken whether paid before hand or not for
whether there was an express promise to pay or not. he can
reclaim on the implied promise or a Quantum Meruit. 1 Bac. 353.

He is not bound to receive goods unless payment or tender of Bailmt.
Hire is made him.

To discharge the Carrier it is not necessary that the goods be lost in transitu - for if lost at the inn where he arrives he is in general liable. He is clearly liable in this case, if the custom is to deliver to the consignee & if that is not the custom he is liable till the time of delivery - so that in either case he is prima facie liable & the onus is thrown upon him. 2 Bl. & 916 - 3 Wils. 429 - Owen 59 - Esp. D. 623.

But where the custom is not to deliver to the consignee in person, but for the Common Carrier to keep the goods or to deliver at a Common warehouse - he ceases to be liable as a Common Carrier, tho' if he is keeper he may be liable in another capacity. But if the goods are not in his custody, he ceases to be liable entirely at the delivery. 4 M. 581 - Esp. D. 623.

If the consignee directs by whom the goods shall be brought, he is regularly to bring the action in case of loss & not the Consignor, the purchaser is to sue & not the seller; as if I purchase goods or send an order for them, here I am the buyer as between the seller & myself I run the risk; the Common Carrier is my servant & if a right of action accrues I must improve it. 8 M. 3303 - Camp 294 - Bull 35 - 1 Rawl. 343-53 - Esp. D. 576.

But where the Consignor selects his own Carrier the Right of action for loss or damage is, in general, in him. As if I order goods & the seller delivers them to what Carrier he pleases; in case of a loss he must bring the action - for there is no privity between me & the Carrier. And, even if I have designated the Carrier, if the seller makes himself liable by agreeing upon the price of conveyance or takes the risk of conveyance, he may bring the action. For this agreement makes him principal & creates a privity between him & the Carrier 5 Burr 2600 - 1 M. 659 - 8 M. 333.

As to the Joinder of parties & how to take advantage of a Joinder. *vis. Pleas & Alts.* ^{This case is not law in part of it.} 1 M. 440 - 5 M. 657 - Esp. D. 623 - 5 Burr 2611.

At C.L. a Post master not being an officer created by Government was considered as a Common Carrier of the Letters he committed to him & adjudged liable as such. But since the St. 12 Car. 1. established a General Post Office & suppressed private Posts. Post-Masters are not held liable as Common Carriers; they are regarded as executive Officers of Government. A Post-Master makes no contract with the parties who lodge Letters; receives no compensation from him; he is paid by the Government therefore there is no privity between him & the party delivering letters at the Office: Salk. 17 - D. Ray. 646 - Cowp. 704 - 754 - Lord Holt's opinion is against this Rule, but it has been well established.

And a Post Master is regularly not liable for the actual defaults of his servants, or under Officers, tho' he is for his ^{own} actual defaults, like another individual. But his servants & under officers are the servants of Government & he acts as servant of the Government in appointing them. 3 Wils. 443 - Cowp. 765 - Salk. 18.

Common carriers have been generally said to be liable on the Custom of the realm & the common method of declaring has been to count upon & recite the custom, as if it were a special one in force in a particular district only. But this is no more necessary than it is for an heir at law to count upon & recite the Canons of Descent: For a custom of the Realm is no other than a part of the Cus. extending throughout the realm. 1 Sid 245 - Hard. 485. 6 - 156. 33 Hob. 18 - 3 Mod 227 - Jones 130.

When property is stolen from a Common Carrier or otherwise lost or injured so as to subject him, when there is no fault in him, when he is guilty of no misfeasance, the remedy is by a special action on the case, Trover will not lie. But if he is guilty of an actual misfeasance as by breaking a Box Trover will lie & where

one pierced a Pipe of Wine & drew out a little, it was deemed a Bailmt. conversion of the whole 8 Co. 146 - 5 Burr 2027 - 5 Bac 527 - Salk. 655
 Hob. 251 - Esp. 590.

He is not then liable in Trover, for actual negligence because to subject him to this action he must have been guilty of some actual misfeasance Salk. 655.

II.nd Of Inn-keepers.

A delivery of Goods or Baggage to an Innkeeper is a Bailmt. of the 5th Class - This subject has been strangely classed by diff. authors. Espinasse places it with Commodatum - to which it has not the least affinity, neither treats it as a Mandate which is equally incorrect. The true place no doubt is in the 5th Class of Bailmts. Jones 130-2 - Esp. 5. 625-6 - Buller 72-3.

It is not however very important where it is classed as the rules relating to it are so well defined. still it is very manifest it belongs here; because it is a delivery to another to do some act about them for a reward is given, at least there are no nominal rewards; the payment is included in a discharge for room rent &c. Storage. Jones. 133-

In this case I shall consider Innkeepers as they are liable for the Goods delivered them by their Guests i.e. as Bailees, which quoad hoc they strictly are - Their other rights & duties will be the subject of a distinct title.

The Bailmt. being mutually advantageous in these cases according to general principles the Innkeeper is bound only for ordinary care & is liable for nothing less than ordinary neglect. But the Policy of the law has extended the liability somewhat further - not so far however as that of a Common Carrier - at least I find no rule extending it thus far Jones 133-5-

In the first place then an Innkeeper is clearly liable for any loss occasioned by the act or default of his servants in any way for he is bound at all events

to provide honest & careful servants 8 Co. 32-3. Bull 73-1 Bl. 430- Qs. D. 626.

You will doubtless recollect that masters are not in general liable for any torts committed by their servants - much less for their offences. But if an Innkeeper's servants steal or rob, the Master is liable civiliter for all the damage occasioned thereby.

So if Goods are stolen by a Stranger the Innkeeper is liable by the General Rule whether he has been negligent or not, so that something more than Ordinary care is required of an Innkeeper. The Rule is founded in policy for the Innkeeper has a great opportunity to cheat, & rob & unite with Knaves & Thieves & for the purpose - for the safety of the public the Rule is adopted. 8 Co. 33^a Cro. Jas. 189-224. 5 M. 276.

There is an exception to the General Rule however, where the Goods of a Guest are stolen by his own servant or Companion or by any one who by his request lodges in the same room with him, for the law in such case, imputes the loss to his own fault, for by travelling with a Companion, he gave him credit & by requesting the stranger to lodge in the Room, he furnished the occasion for stealing by showing him where the effects were & by affording him greater facility to steal them. Cro. E. 285- 8 Co. 33-3 Mac 183- Qs. D. 625.

And an Innkeeper's Trust is liable for a loss occasioned by Common Robbery & on the same principle of policy: There is however nothing definite to be found on this subject. ^{by public engines} Mowden says if the house is broken open & the goods taken, he is not liable. I find, however, no rule that places him under the same liability of a Common Carrier. Jones says that a force truly irresistible excuses the Innkeeper, i.e. if it were irresistible by the Innkeeper & all the force he could command. - Indeed the reason Mowden gives, why Robbery excuses is that such violence cannot be resisted -

Sir H. Jones' Rule appears to be the correct one. 8 Co. 32^a Jones Bailmt
135^a 46. New. 9-3 Dec 182.

The common impression is that an Innkeeper is liable to the same extent with a Common Carrier & indeed, I must confess, I do not see, why he should not be, his house is absolutely necessary for the accommodation of travellers; his means of defence are incomparable greater than those of a Common Carrier; he is surrounded by his castle in the midst of his family & his means of colluding with Robbers & Thieves & affording them facilities to depredate are much greater than a Common Carrier, who, on the contrary, is travelling on the Highway, usually alone & unprotected.

It is laid down by Coke, that an Innkeeper is not liable unless there is some default in him or his servants, thus reducing his liability below ordinary care. Buller denies this & says to subject an Innkeeper it is never necessary to prove negligence. & a Common Carrier is liable for all losses, except those occasioned by the Act of God - Public Enemies, or the Bailor himself - The exception is more comprehensive in favour of an Innkeeper, who is excused if the loss is occasioned by irresistible force 8 Co. 33^a denied to be law 5 T. R. 276 - Espinasse has adopted Lord Coke's rule & that since the decision in 5 T. R. 276, he is apt to make mistakes Esp. D. 626-7.

An Innkeeper is liable for those goods only that are infra hospitium including Stables & Out-Houses 8 Co. 32^a Bull. 1072

If then the effects are removed by the owners directions & lost the Innkeeper is not liable as such, unless there is some actual default in him - as if he should order his horse to pasture, if he were lost, the Innkeeper as such would not be liable on the principle which governs this title -

But, on the contrary, if the Innkeeper put the horse

to Pasture without the consent & direction of the owner
he would be liable & Co. 32^l 1 Roll 4 - Bull. 73 - Rep. D. 626.7

The remaining Rules relating to Innkeepers will be
considered in a short title by themselves. Post. 273.

VII.th Mandatum.

A Mandatum is a deliv-
ery of Goods to a Bailee to be carried or some acts to be done about
or upon them without a Reward, or done Gratuously.
The appropriate name is mandate, it is sometimes incor-
rectly called acting by Commission, but it has no relation
to that species of Trust. The Bailment is a Mandate. The Bai-
lee a Mandatary. Jones 50-73. 2 Ray 910.

The difference between a Mandate & a De-
posit is merely, that the latter lies in Custody, ^{the former in} keeping possession
of the ~~Mandate~~ in fee simple, as conveyance, or doing something
with or about it.

This species then appears to be of the same na-
ture of a Deposit, it is beneficial to the bailor & so by the
Genl. principles it is clear, as it is well established by authority
that the bailee is bound to good faith & liable for gross neglect
only 2 Ray 909 - 1 Paw. C. 255. 1 Al. 158-161-2.

As in other kinds of Bailment where there
is a special contract, to use a given degree of care, the
bailor is liable if loss is occasioned by his omitting to use
it. This was the case in Caggs by Barnard Ab. Auth. & Jones 75

And an agreement to use all necessary care &
skill may be implied in certain cases, but such agreement
is not to be implied unless the act to be done is in the
way of the bailor's profession or occupation. Thus if
a Sailor gratuitously engaged to make a garment he im-
pliedly engages to use all the requisite care & skill 3 Al.
165-6 - 1 Al. 158. 11 Co. 54 - 1 Saund 324. Jones. 139.

Sir Wm. Jones makes a distinction between the duties of a Mandatary when it consists in performance & when in Custody, or in other words, between the duty of a bailee when it lies in possession; & when in keeping possession. When his duty consists in actual possession he says a great degree of diligence is requisite; to use his own expression, "a degree of diligence adequate to the performance of the undertaking."

Now I confess that this is a distinction, of which I neither see the reason nor feel the propriety; it is arbitrary & not countenanced by any Judicial determination - It is an unhappy peculiarity in this excellent little Treatise - - Denied the 10th. 3d. 105-6 - 1831. 158.

This I trust is a distinction unknown to the C. J. There is however a doctrine quoted in the last case from Blackstone by Lord Loughborough which deserves attention as coming from such a respectable authority. He says that when the engagement by the bailee is to do the act skillfully, the omission of the necessary skill, is Gross Negligence. So too when the law implies such an undertaking - so that if a loss is occasioned by a chance, it is Gross neglect in him not to perform his engagement. The amount is that whether the bailee is subjected, he is of course guilty of Gross neglect, whether subjected or not - such a Declaration confounds the diff. degrees of care & neglect. The whole doctrine in the case of Coggs & Barnard & all the other subsequent cases are rendered nugatory. for it reduces all bailees to a level by subjecting them all when in any manner liable, on the ground of Gross neglect. It deranges the whole symmetry of the system, with equal propriety it might be said that a Common carrier when subjected at all, shall be liable on the ground of gross neglect, as if he were Mobbed. Lord Loughborough appears to go on the ground that a bailee by his engagement is subjected only for gross neglect - whereas a bailee may be subjected for slight or ordinary neglect.

"When there is no engagement express or implied to use skill, or more care, than he uses in his own affairs, he is liable for gross neglect only. Thus in the case, in *1 H.L. - c. 4, 13*, having two consignments of goods, A agrees to enter them both at the Custom House, but A having entered them by a wrong description they were forfeited by the Revenue Laws - therefore B. lost his action against A, but he did not recover for there was no special engagement to use skill & the Law implies none A being a General Merchant & altho' he might in fact have been guilty of gross neglect yet as he lost his own goods, it afforded no presumption of fraud. *1 H.L. 158 - 1 Pair. C. 255.*

The true distinction then I take to be that when one engages to do an Act gratuitously in the line of his profession or occupation, the Law implies an agreement on his part to use all necessary care & skill; but when the Act stipulated to be done is not within the line of a Mandatary's profession, he is liable only for Gross neglect.

The agreement then implied in Law extends, it seems, only to the saving of the Act stipulated to be done & does not include any accidents from foreign causes, that is not connected with the stipulated Act. Thus, in the case of the Tailor before mentioned, the Law implied a contract to use the necessary care & skill in making the garment, not to preserve the garment or cloth from, either, inevitable accidents, &c. and he is not liable for losses thus occasioned, unless he is guilty of gross neglect in exposing the Goods. As to the duty of keeping & restoring, the Law implies no greater liability on his part, than on the part of a person, who is of no particular occupation, or a mere Depository. *Widanta 2nd 13.*

Thus if a Tailor agrees gratuitously to make a garment, if not well made, he is liable; but if well made & stolen afterwards, because he left his door open, the question of his liability must depend on the proof of fraud, in the case of gross neglect, which is presumptive, if the goods

of the Bailor's evidence in favor of the Bailor's interest in the current Bailment. To all these things he would be liable. But I think the Bailor's evidence is a mandatum in itself, which in the professional situation is consonant with the opinion of the Court, that he is not very far from being a mandatum. Dec. Ray 902-1. Dec. 6255.

And there is an express agreement by the Bailor to keep safe; he is not liable for losses, occasions, by fire, or inevitable accident & I think clearly he is not liable on such an agreement, without some degree of default. When one contracts thus "to keep safe" he only means that he will use all reasonable care for that purpose. He cannot be considered as waiving apart the act of God, as tempest &c. so that if he is in default, he is not liable, however unconditional the agreement may be. Dec. Ray 910-15- Jones 62.

But I trust a mandatum cannot secure himself by special agreement, from liability for fraud, it is contra bonos mores & so illegal by the principles of Contract. Jones 60, 5.

There has been some contradictory opinions expressed as to how far an agreement by a mandatary is binding as a Contract, or an agreement, to carry goods or to some act about them gratis. & according to some opinions the mandatary is not bound by his agreement as a Contract because it is a nudum pactum, but his liability is founded on Tort or Fraud in want of care.

According to others & as I think, on principle, upon delivery his agreement tho' voluntary binds him as a Contract. It is so far voluntary that he gets no benefit; still the delivery is sufficient consideration. Dec. Ray. 909-10-19-20

The true distinction is, that if one gratuitously engages to be a mandatary, & afterwards refuses to be so, he is not bound. The Contract is nudum pactum, but if the goods are actually delivered into his hands he is liable & may be sued in assumpsit, which sounds altogether in Contract.

is true however that he may be also sued in Tort 5 B.R. 149-
The distinction there taken is that if A. agree gratuitously
for B. if B. does not deliver the material A. is not liable, but if
he does A. is liable. Lord Holt says that a delivery on one side
is an entry on the trust by the other is sugt. cons. 11 Bar 241
12 Mod. 420 - 12 C. 124 - 12 C. 124 - 12 C. 124 - 5 B.R. 149 - 150 - 1 Bar 264. Bro.
607 - Contra Yelo. 4 - 120.

In the case in Yelo. it was holden that the
agreement did not bind as a contract & there are other opin-
ions to that effect. But the case in Cro. Jac. is a very strong
case precisely in point & the case in Yelo. is then considered over-
ruled. In Cro. Jac. A. delivered money to B. on a promise by
B. to deliver it over to C. without reward. B. failed to perform
A. then brot. his action agt. B. on the express promise sta-
ting the delivery only as cons. & recovered. & law it is impos-
sible to recover this, unless the agreement were binding as a con-
tract. It is true A. might have recovered had he brot. an
action on Implied Assumpsit for money had & received, but
this was an express contract & seems to have been brot. pur-
posely to try the question Cro. Jac. 667-8 Lord Holt recognises & con-
firms this doctrine in the case of Coggs & Bernard.

Sir. W. Jones observes however that where spe-
cial damage arises by bailee's not performing his agreement
as by not becoming a Mandatary when he has agreed to an action will
lie agt. him Jones 76 to 80. He also says that the ground of the ac-
tion in these last cases is some special damage; but it is to be
remembered that it is a breach of contract the damage ac-
cruing from: it is difficult to suppose that there can be spe-
cial damage in consequence of a breach of a contract which
does not exist.

Thus A. agrees gratuitously that he will carry a
letter to C. & B. from disappointment or even caprice, if
you please he does not carry & B. suffers a loss in consequence
of it. Sir W. Jones says an action agt. C. would lie. I can find how

ever I know of no principle of L. to support him. True Bailm.
if there were an actual delivery or caws. paid, or promised
or fraud in the case, I might sustain his action.

Sir W. Jones agrees that the action
could not be maintained, unless the special damage, but if
there isn't one. Now every civil action must stand in con-
tract or Tort: by the hypothesis there is no fraud or misfeas-
ance, so that it cannot be supported on that ground. But can
he be subjected on the ground of contract? Sir W. Jones says
not. But how is he to support the action? the validity of a
contract is, generally, determined from the facts existing
at the time of making the contract; it must be good in
itself & the special damage may increase. Damages
in an action on the breach yet special damage can
never give validity to a nudum pactum. It can never settle
the question as to the right of action: a contract cannot
be made binding by any thing ex post facto. And if a con-
tract has not virtue enough to support an action with-
out special damage, it certainly cannot have with it. Sir
W. Jones is certainly mistaken. That no special damage is neces-
sary, viz. 20 May 909-10-19-20- Jones v. 50. Gould says, that
damages are presumed & the Def. cannot rebut this presumption. viz. ante 104.

Sir W. Jones says further, that when an action
is brought against a Mandatary, "negligence is the ground of the ac-
tion & not his express undertaking". I do not see how he is
subjected by negligence, if the Contract is the foundation
of the action. Neglect is out of the question. If negligence
is the ground of the action it must be on the ground
merely, that the party has been guilty of a breach of con-
tract & therefore the action may be brought on the breach
of the promise.

Besides one or two cases contradictory to this
where a Mandatary expressly undertakes to use a given
degree of care, he is bound to the extent of that en-
gagement. But how can he be subjected by his express

promise, when that does not bind him? how can it extend his liability beyond what the Law would require of him? a careless Mandatary engages to carry goods over mountains & Robbers. Does settle the question that he is liable in case of loss. How? Jones says in consequence of negligence? But suppose he used the utmost diligence would he not be liable? How is it that he is liable further than the law requires of the agent? is a Mudum pactum? It follows then I answer that the contract binds him. Sir William is consulted on this subject, but his authority is too respectable to be passed in silence.

The true distinction then is when one engages gratuitously to become the Mandatary of another & afterwards refuses he is not liable; but if he does become Bailee & makes an engagement he is bound to the extent of it by virtue of the contract 2 Wms. 904-1019-5 East 40. 149-150-3 East 62.

Miscellaneous Rules.

Under this General division of Miscellaneous Rules applying to Bailments in general the first enquiry is.

What does Bailee owe Bailor?

A Lien is a direct claim or incumbrance upon some specific property of another by way of security for a debt or duty & is always accompanied with actual possession.

A Special Property & a Lien are two distinct things. There can be no Lien without Special Property, but there may be Special Property without a Lien.

A Lien exists in favour of Bailors of the 4th class & 5th, i.e. Bailees & those doing acts about Goods for a reward. A Lien does not however exist in favour of all Bailors of the 5th class.

All ^{or} Bailments have a Lien on the Goods bailed. Bailment
 It is a right in the delivery & the terms of the Bailment with-
 out anything done or fast facts by the Bailor. The precise ob-
 ject is to create a Lien to secure debt or duty & the security
 consists essentially in the existence of the Lien right
 of Possession. The Bailor then has a right to sue on the contract when
 the contract is to hold the property until the per-
 formance of the Bailment is accomplished, which is a discharge
 of the debt or duty. Cro. 2. 144-5 - 170. 170 - 522 - 180. 180.
 419 - Esp. 2. 503. 2 Cpl. 453. n. 11.

Most Bailments of the 5th Class have a Lien
 i.e. a right to retain possession of the goods by way of se-
 curity for compensation; here the Lien is not created by
 the terms of the Bailment, as in the case of the pawnbroker, the
 object of the Bailment was that the Bailor should do something
 for which he is to have a reward, for the security of which
 he has a Lien upon the goods by a condition in law annexed
 to the Bailment. The law does not require that the bailor should
 pay his own safety demand payment before he has received goods,
 but enables him to retain the property until he is paid 31 Dec 185.
 180. 180.

It is not universally true that Bailors of the 5th Class
 have a Lien, tho in general they have, as I shall distinguish,
 as I proceed.

Tho certain Bailors have a Lien, yet third
 persons who obtain possession wrongfully from the bailor can-
 not avail themselves of it. The Bailor may recover with-
 out tendering to any body, & if a pawnbroker's goods &c.
 &c. gets wrongful possession of them, he may recover them
 without tender &c. cannot retain against either. 2 B. 185
 3 East 555.

In the 1st place the Common Carrier has
 this Lien or Right to retain the goods until the owner, or
 till paid the Reward or Price of transportation if he may
 keep the goods even soever if he is not paid delay, 52

De Ray. 867. 5 Burr 2096- 5 Benc 269- Salk 654- 2 A. R. 64. Contra *De Ray*.
de Ray. 867. not law.

And indeed if goods are stolen & delivered to a Common Carrier by a Thief, he may retain them ^{ap^t} the true owner, until he is paid the price for transportation, for he has he is obliged to receive & convey all goods tendered him & the law does not oblige him to be so unmerciful, as to demand payment before the act is done, but allows him to retain them as ^{cust} security after. *De Ray* 867.

An Innkeeper on the same principle has a right to retain the Horse of his guest until the expenses occasioned in the Horse is paid & so of other animals. *De Ray*. 868. Bull 45- 3 Benc. 268- Salk 388- 8 Co. 147- 3 Benc 185.

And tho' the Horse of the guest is taken there by one who is a Stranger, who does not own him, & the Innkeeper provides for he may retain him ^{ap^t} the true owner, until the expenses are paid. The case is parallel to & precisely like a Common Carrier & founded on the same principles. *Yelv*. 87. *Pop*. 128- 179- *Exp. D.* 584. *vid post* 277.

An Innkeeper may also retain the person of his guest until the whole debt is paid, for he is a pledge for the whole bill, tho' ^{the pledge} upon the horse is only for the expense of the horse, for as to that the Innkeeper is bailee, & in cases of Bailement a Lien exists only on the thing bailed & extends only to receive payment for the labour bestowed on the subject of the Bailement. *vid post* 277.

But the person is in the nature of a pledge for the whole Bill & no legal process is requisite, if the Innkeeper would take advantage of it. He may retain his guest with his own right hand & the assistance of his family if he pleases & shut him up in any apartment until his expenses are all paid. This is one of the cases in which the law allows an individual to enforce his own remedy. *Shaw* 264.

3 Bac 106 - 2 Roll 85.

Bailm^t

But in this & in all other cases of Lien the Right is lost by a voluntary relinquishment of actual possession to bailor. Thus if an Innkeeper or Common Carrier delivers possession to the owner, he cannot reclaim; his right is gone forever - For a Lien cannot exist without actual possession & Lien without possession is a fiction - and if one abandons, voluntarily abandons possession he abandons the Lien: actual possession is of the essence of the Lien, so that loss of a abandoned destroys the Lien, this is the principle. Stra 557 - 1 Burr 493-4 - 1 East 4 - Esp. D. 584.

A Sailor who has a Lien upon the materials which he has wrought or incorporated in a coat or hat or other Mechanick in general, so that a Sailor may in general retain the garment until he is paid the price of making it 3 Co. 147 - Hob 2 - 1 Mod 7 - 1 Bac 245. 2 Pl. 453. n. 11.

In the latter case the same reasons however do not exist as in the case of the Innkeeper & Common Carrier, for the Mechanick is bound to labour for any man, but in cases of this kind the condition is annexed as it is said, in behalf of trade & commerce meaning Manufactures & Commerce.

When however the Mechanick is in the habit of trusting to the personal credit of the Bailor, he ought not to detain or in a particular instance assert the right of detainer without having given previous notice or information at the time of receiving the goods. For if he does not give this notice he is presumed to receive as he had done before: there is no judicial determination on this point but it is laid down by the editor of Bacon 1 Bac 240.

But an assisting farmer who is bailor of the 5th Class has no Lien for neither of the reasons which operate in the case of the Common Carrier or Innkeeper,

or in the case of the mechanic exist in his name; he is not
 bound to receive for Postage; & the interest of Trade or
 Commerce are not ^{at} all concerned. Bull 45 Bro. 6. 197 1 Bac.
 240.

The Captain of a Ship has no lien upon the Ship
 for wages & stores, tho' the Mariners have. The reason
 is that the Captain is presumed according to the common
 course of business, to trust to the personal credit of the
 owners, but the Mariners trust to the Ship. The Mas-
 ter is employed by the owners, the Mariners by the Mas-
 ter who acts as agent in engaging them & they are entirely
 unknown in many cases to the owners. Doug. 97-101-
 Abbott on Ship. § 140-460 - Do Bay 32-576-129. Had 445. That the
 Mariners have a lien on the Ship. ^{tho'} Id. 937- Doug 101. Abb.
 Ship. § 459.

But when there is a special agreement upon which
 a dealer relies for his compensation, the law on a lien
 in his favour. Thus in the case of a Carrier to whom a horse
 was delivered & he kept 4 weeks, it was found that the
 owner had to pay a sum certain & it was determined that
 that agreement, entitled him of his lien on right of detainer, the
 reason assigned is that when there is such an agreement
 the carrier does not rely at all upon the property, the fact
 shews that he trusted to the personal credit of the owner.

I believe however that the true reason is
 more artificial, it is this, that where there is an ex-
 press agreement the law cannot imply one, on the maxim
 "expressum facit tacere tacitum", although it may imply one
 when the parties have not made one. 2 Roll. 92. Yelv. 66-5 Bac.
 271- Asp. D. 585-6-

So also a Factor or any Commercial agent
 in general has a lien upon the goods of his principal
 in his actual possession for the balance of acct. between them.
 For a variety of Rules respecting Merchants & Agents see.

to the true owner, because it is said that the bailee cannot judge between the bailor & the true owner. But the Rule you will observe goes further than the reason 1 Roll 606; 1 Bac 237-42.

I apprehend this rule means nothing more, (if it does it means more than is Law) than that the bailee will be justified, if he redelivers to the bailor & that he may thus discharge himself of the claims of the true owner; the reason assigned goes no further. It would be extremely hard to compel him to judge at his peril for he might be thus subjected to a loss when the Rule was for his protection & the Law will not subject him if he redelivers to the Bailor. This ought to be the Rule on principle.

It would be unjust to assist the owner of his property who, I take it might reclaim it at pleasure—again. How can the bailor confer a right, which he has not, to a person to withhold the property from the owner & that too when the bailee knows in fact?

Besides it is said afterwards in Roll from whence the original Rule was taken, that if the bailee delivers the property to the bailor, before or pending an action bro't ag^t himself, by the true owner it will bar the action. This protects the honest bailee & does not deprive the true owner of his right: it shows that the owner may recover of the Bailor. 1 Roll 607. Fitz. 137. 1 Bac 242.

In cases of this sort where there is a dispute about the title to the property bailed if the owner does not exhibit sufficient evidence of ownership, the bailee ought not on principle to be subjected, but if suff. ev. were shown, I trust he would be liable, unless he discharged himself as above by delivery to the bailor. 2 D Ray, 867.

The rule laid down by D Holt is that if goods owned by A. are stolen by B. & delivered to a

Common Carrier, he may retain them untill the true owner is paid, & no longer - i.e. until paid for transporting them.

Now if the Rule from Roll is correct the one from Holt is entirely negatory & the common carrier would be bound to deliver them to the thief, altho he knew the facts. 20 Ray 867 - 6 Esp Dig. 590

Again according to the rule of Roll if the bailee is a carrier, & this rule has since come into force by the Goods, the bailee must deliver to the true owner at his trial, & not to the bailor, i.e. he will not be discharged in delivering to him for his testator received them against the claims of the true owner, because it is said the bailee having acquired possession by his transmission from the testator, he must deliver to him who is the true owner in Law. This rule seems to present a case somewhat agst. the 6th; The testator might have delivered to the bailor & discharged himself of the claims of the true owner, because he could not be compelled to judge between the claimants. The 6th does not of course possess a better opportunity of judging correctly & in most cases not as good - There is no decision contrary to Roll's Rule but I conceive that cannot be Law - It appears to be arbitrary ground on reasoning as technical and artificial as can be supposed. I suppose that the 6th stands on principle precisely with his testator & in his place & may discharge himself in the same way. 1 Roll 607 - 12 Jac 237.

We are now to consider the Rights of those persons who purchase under a bailee & the Rights of Creditors who levy upon the goods supposing them to be his. Cases often occur in which the following Rules will be found useful.

I would observe that by the Stat. 21 Jac II. which I take to be in affirmance of the 6th. if a person becoming a Bankrupt has in his possession Order & disposition the goods of another or by his consent they are liable for the debts of the Bankrupt.

The Bailor's rebutting any presumption of actual fraud Bailor
 between himself & bailee is of no avail, as between him-
 self & bailee's Creditors. Their claim is not founded on
 any presumption of Fraud, but upon this false credit which
 the ostensible ownership gave the bailee. 1 Ves. 365. 1c. 11th. 1003.
 This Stat. seems to be founded
 upon & in affirmance of the great principle of the Co. that
 when one of two innocent persons must suffer by the act
 of a third, he who occasioned or enabled the third person
 to cause the loss, shall suffer rather than the other.

The Bailor in this case by permitting the bail-
 ee to act as ostensible owner has given him a general
 credit; the question whether the credit given in a partic-
 ular instance was thus acquired, was never made, it is safe
 that the poss^r deceived the public & thus the bailor enabled
 the bailee to occasion the loss - he must therefore be the
 loser - This is clearly the Rule of the C. & of Equity. 2 Ld 70.

If the Stat. of Inc. is in affirmance of the C. & it follows
 that the Stat. & the construction it has rec^d in England are
 of as much importance here as there.

It is not to be understood that this
 Stat. extends to goods in the possⁿ of the Bankrupt, which
 he holds in the right of another. Vly. vs Guardians, Trustees,
 &c. for the Law in such cases gives him possⁿ & the
 party in whom the right of property is, cannot prevent it.
 It is not in consequence of any delegated right of possⁿ that they
 are so held, & it is not the fault or folly of the owner or Bailor
 that occasions the loss, of course the case does not come within
 in the Stat. 1c 11th 159 - 3 P. W. 187. note 3 M. 610.

The Stat. however does extend to e. Mort-
 gages as well, as absolute sales, of goods, when the creditor will
 hold to the exclusion of the e. Mortgagor of the goods, who is left in
 possⁿ. 2 Robt. 549-57 - 1c 11th. 165 - 1 Ves. 340 - 1 Wils. 260 - 2 Esp. D. 566 - 1 Selw. 109 & 90.

You will observe however that the same rule does not hold in relation to Mortgages of Land for the Mortgagee, being in possession of the land is no evi. of his Legal title. The title of Land may always be traced & if the creditor does not choose to examine the title & so on. it is his own fault. The Stat. of Lac. extends only to Mortgages of Personal chattels.

Neither does this Stat. extend to the Sale of a Ship at Sea, for in this case immediate possession cannot be given. Suppose A. mortgages by a Bill of Sale a Ship at Sea; immediate possn. by B. is impossible & A. is constructively in possn. by his Agents, the Master & the Crew. Still the Stat. does not reach the case of a Mortgage & it will hold to the exclusion of the creditors of A. the Bankrupt, because immediate possession cannot be taken. B. must however take possession immediately on her arrival & if he does not, if he suffers her to remain in the Vendor's or Mortgagee's possession, it will continue his false credit & thus come within the Spirit & operation of the Stat. 1 & 2 Hk. 160-180 354-616-2 J.R. 462-405-491. Exp. D. 5678. J. Selic. 197.

Thus; if a Store of Goods are sold by a Bill of Sale & the Goods delivered to the purchaser it is sufficient, as it gives him the control over the subject, so that if the Vendor afterwards becomes Bankrupt, the vendee will hold to the exclusion of Vendor's Creditors. 7 J.R. 71-2 Stra. 955. Exp. D. 800.

So also to bring a case within the Stat. the goods must be possessed by the Bankrupt bailee as his own goods are, i.e. he must not only be in possession but must have the order & disposition of them, to use the language of the Stat. That is, he must use in some such way as to appear the visible owner to the world. Secus, the possn. would give him no false credit. Thus: A Box is deposited with the Deponentary, shut up out of his sight, so as not to appear his, or not to appear at all indeed. There would not be liable for the Bank-

rupt's debt, merely because he was depositing

But if A purchases an assortment of goods with-
ing to remain a dormant owner suffers B. to take possession
of the Goods & to sell, manage, traffic & treat them as his own,
make contracts about them in his own name, the case is different.
The Public suppose the goods belong to B. he does not call himself
the Clerk of A. but contracts in his own name, these goods
then give B. a false credit & they are liable to his creditors.

But on the other hand, if one lends another a
horse to ride a mile or a journey, the creditors cannot take
it. For the possⁿ for such purposes carries no evi. of owner-
ship & if the rule were otherwise, it would be extremely in-
convenient; a Bankrupt could not go to a mill. But the
great & decisive principle in this & similar cases is, that the bai-
lee get no false credit among prudent men by such possⁿ.
Couch. 293-1c & Hk. 185. 3 M. 216. - 2 Esp. D. 567, 70.

Hence also a temporary possⁿ by a person be-
coming a Bankrupt for a particular special & necessary pur-
pose, does not bring the case within the Stat. Thus A. sends goods
with B. to keep, while he (A.) could have an opportunity to send for
them, or if you please till a storm be overpast, or till a ship or
Wagon arrives: & in the meantime B. becomes a Bankrupt
his creditors cannot hold them, for these are cases evidently
not contemplated by the Stat. if they were, no man would
be safe, unless his goods were in his own hands. 1c & Hk. 185
& Selw. 197. 200. 2 Esp. D. 567.

And a Bankrupt bailee must appear
in every respect to be the owner, to bring the case within
the Stat. for if from the nature of his business the presump-
tion of his ownership is excluded, the bailee will hold to the
exclusion of the bailor's creditors. Thus A. is a Factor in
the possⁿ of B's goods, so far as his act goes, he appears to
use them as his own & to have the whole control, yet as he

is known to be a Factor, if he should afterwards become bankrupt his creditors could not take the goods, the principal or bailor will hold for the bailee, being thus known could require no false credit by the poss^r 1200. 82- 1070. 318-286. 185- Esp. 9. 570.

Thus far have I treated of the rights of the creditors of the bailee - & I want further observe in relation to

The Purchasers under a Bailee.

The Purchasers under a Bailee who suppose the goods belong to him will hold ag^t the bailor, precisely like the creditors of the bailee, i.e. according to the distinctions already taken 2 Bac 602, 3. Indeed where goods have been sold & permitted by vendor to remain in possⁿ of vendor, who becomes insolvent, the stat^t 2^d Eliz^z provides, that the subsequent purchaser shall hold in exclusion of the first purchaser. The stat^t 21 Jac I. affects the same purpose & extends also to cases in which the goods have not been sold.

The C.D. however, would have attained all the ends of both these stat^ts; at any rate the stat^t of Jac. has been considered declaratory of the C.D. in Ct. & correctly I think that the stat^t of Eliz^z is of the same character, vid. Comf 434.

2 Bac 602, 3.

In common cases of Bailments (where the bailee is not in the order & disposition & is not of course the ostensible owner, or when he does not become Bankrupt) the General Rule is, that the true owner, i.e. the Bailor may recover ag^t the purchaser under the bailee, or any subsequent purchaser, or a creditor who levies on them as Bailees, unless the sale was in a Market Port - So also, ag^t a person into whose hands they might otherwise have fallen, however honestly, he might have obtained them, the maxim being Caveat emptor.

Bailment

Here you perceive there is no credit given solely for a^{tho} the goods are in the actual possⁿ of the bailee, yet he has not the Order & Disposition of them & for this reason the purchaser cannot hold them, a^{tho} the bailee should treat the property in such a manner as to excite a belief that he was the Real owner. The Sale is a breach of trust & can convey no title. Thus A. lets a Horse to B. to ride 5 or 100 miles, B. in breach of trust sells the horse to C. while on his journey, C. cannot hold a^{gt} the bailor for the circumstances of B's riding the horse is no evi. of ownership; the fact of letting & hiring Horses & Carriages is a fact of daily occurrence & if C. should sell to D. & so on, it is immaterial how numerous may have been the sales, or honest & indiscreet the purchasers, the Rule is the same the purchaser must lose his money unless he can recover it of the swindler, or the horse has been sold in a Market Court. for you observe the bailee has not the Order & Disposition of the Horse. 1 Wils. 8. 2 Stra 1187. 3 Atk. 44. Salk. 283. Resp. d. 579.

And in another case which the great leading case in the English Reports; where A. deposited a sealed Bag of Jewels the question arose whether the pawnee could hold a^{gt} the true owner, who had traced up to him the Jewels in the first place were pawned with a Jeweller & he in breach of his trust broke the seal & pawned the Jewels to the pawnee - on this Question the court held unanimously that he the pawnee could not & it was solemnly determined, that a^{tho} in the possⁿ of the Jeweller, yet he was not in the Order & Disposition of the Jewels. Darton vs. Moore. 3 Atk. 44. 1 Wils. 8. 5 Bac. 260. 6. O. Resp. 579.

When the bailee has been in possⁿ for some considerable time but not in the Order & Disposition of the goods with the owner's consent, the Rule is the same, it has however been a good deal grumbled at. 3 N. B. 376. 4 Ld. 640.

But there is an exception to the General Rule, when the property bailed is Money, i.e. Specie, Bank Bills or whatever constitutes the currency of the country. In cases of

this kind a regular transfer by the bailee to a bona fide receiver in, for a person ignorant of Bailor's right will bind the property tho' it be not in Market Court 3 B. & W. 1516 - 1 B. & W. 1131. & 412. - 20 J. 2. 39-579.

Thus if A. delivers or deposits a sum of money with B. for safe keeping for a longer short period. & B. in breach of trust transfers it to another, who does not know of A's ownership; the receiver will hold to the exclusion of A. Indeed the rule would be the same if B. had stolen the money.

The reason assigned for this exception is, that money has no "ear mark" but this reason will not hold in the case of Bank Notes any more than it will in the case of the coin itself & it is not the true reason, altho' it is a quaint one. The truth is the Rule originated in Commercial policy; it is currency that is enough; were it otherwise no one would be safe in the present degenerate state of the world & if every one was obliged to enquire into the title of the holder of money before he rec'd it, Commerce would be at a stand. 1 B. & W. 452 - 3 B. & W. 1516. - 1 M. & W. 204 - 20 J. 2. 39-479.

I have observed that we have no such Statute 21. Jac. I. but the Rule adopted by our Court is conformable to it. I conceive that our Court consider it as B. & W. & 20 J. 2. very properly. But in England & Ct. (for I take the Rule to be the same in both) the Creditor of a bailee, who seizes the property as his, or a purchaser under a bailee will not hold the property in any case unless the bailee is insolvent. The reason is, if the creditor can have his remedy against the bailee (as he can in this case of solvency) the purchaser can receive no injury, for he has his remedy against the bailee on the implied warranty & the creditor has it in his power to lay on other property.

The reason why the Purchaser or Creditor can hold in any case, is the great principle

principle of the C. & S. before recited as the foundation on the Bailm^t Stat. "that where one of two innocent persons must suffer by the act of a third, the one who occasioned the third to cause the loss, must bear the loss". And unless the Bailee is a Bankrupt there is no false credit given - It is therefore indispensable under the Stat. & at C. & S. that the bailee be insolvent to entitle his creditor or Purchasers to hold, otherwise there is no occasion to divert the bailor of his title. 3c 44.

And even if the Bailee is insolvent his purchaser or creditor will not hold agst. the bailor unless the pass^g was such, as to give him a false credit: this rule is founded in the words of the Stat. "Bailee must have been in the Order & disposition of the property," by which is meant he must appear the ostensible owner of it - 1 B. & P. 82-8- 640- Doug 306- 7 T. 267- 237- 1 Ves. 243- 1 Atk. 185.

And yet the creditor of an insolvent bailee will not hold agst. the bailor unless the terms of the Bailm^t were such as to entitle the bailee to the pass^g as his own, i.e. he must appear the ostensible owner, otherwise he has not the Order & Disposition of the Goods by the consent of the bailor: the consent is indispensable, thus in the case of Harlop & Moore. The Jeweller broke the sealed Bag & thus became the apparent owner, but breaking the seal was a breach of Trust & the Jeweller did not appear the ostensible owner, nor had the Order and Disposition of the Jewels by consent of the owner; he could not appear ^{owner} by the terms of the Bailm^t any more than a thief could. 3c 44-1 B. 185.

The general principles governing the relative rights of a bailor on the one hand, & those of the creditor on the other, i.e. creditor of the bailee or purchaser under him, have already been explained, but as they

are of frequent application. I will state a few more exam-
ples.

In being a case within the Stat., the bailee must not only be in possn., but he must have the Order & Dis-
position of the Goods, i.e., he must appear to the world
the true owner of the Goods & this is also the C.S. rule. So
if A. purchase Goods of B. & leave them with him until
he can remove them, if B. becomes insolvent, they will
not go to his creditors. ^{2d} If a Traveller leaves his horse
& leaves him with a farrier to be cured, or with a car-
riage & leave it with a smith for repairs & in the mean-
time the bailee becomes Bankrupt, there is no pre-
tence that the creditors can hold agt. the bailor.

And it is a General Rule, that where there is give-
up to the bailee for a particular, special, reasonable or
necessary purpose, a temporary possn. The creditors of
the bailee on his becoming Bankrupt cannot hold agt.
the bailor. Doug 603 - 1st 105-6-7 - 6 Sp. D. 567.

Now the circumstances under
which one man may be in the possn. of the goods of an-
other in the character of a bailee are indefinitely mix-
ed & numerous. There are many cases in which a cred-
ulous man would trust to the evidences of ownership, when
a cautious prudent man would not. I have however as-
sailed the criterion as far as I was able.

I will state another example
which occurred in this State. A Merchant, Drover
of Beef Cattle, (or Bees) hired a driver to take his cattle to
New York. The driver left the main road & sold the
cattle to some incautious purchasers, whereupon the
owner claimed the cattle & recovered them in an ac-
tion of Trover. The mere fact of driving was no evidence
of ownership. The truth is owners but seldom drive their
cattle to market. many cases might be stated, but it would be superfluous.

Where goods are bailed for hire to be used for a certain time by bailee, it has been a moot question, whether the bailee's creditors could take his interest in the thing bailed on hire. Thus: suppose A. hires a Yoke of oxen of B. for six months; here A. has a pecuniary interest, for that time, Can his creditors take by force his special interest? Lord Kenyon seems to assume this in his argument where he says, that the creditors would be entitled to the beneficial use during that time of the property.

But I conceive that the creditors cannot take the goods. I ground the ground, that a Bailment of a present chattel is always a fiduciary contract. I think in my observations on the subject of Pawns, I showed clearly, that a pawnee cannot assign a pawn, until the property becomes absolute in him; Can a creditor of a hirer take his interest in the thing hired? If he can, if one should hire a house, to day to go to N. his creditors might take him from him, & that too when the hirer could not assign the chattel.

I repeat, the contract is founded on personal confidence & confers no right in the bailee to transfer; that was not the intention of the parties. If bailee could lawfully assign he would not be answerable for subsequent bailee's conduct & a stranger would be the arbitrary disposer of another's right or interest. - It appears then to be going too far then, to say, that a bailee can assign personal chattels, a fortiori his creditors, then, cannot take them. for Lord Kenyon's dictum vid. 7 M. 11-12 That a bailee cannot assign 5 M. 604 - 7 Quest. 6.

The truth is however that Lord Kenyon's opinion secundum subjectum materiam is not at all repugnant to the principle. I have laid it down, that the case was a question as to the Signature, sealed with a House & as the term might be taken the goods ^{might} doubtless be taken with it. 2 Bae 322 - Com D. Exon C. 4. Salk 404 - D. Ray 1795-913-15-16.

Thus far as to the relative rights of Bailor on one hand & Bailee & Purchaser under the Bailee on the other; We are now to enquire.

To what extent the Bailor & Bailee may be respectively entitled?

It is a Genl Rule (laid down in the Books as Universal) that the Bailee, as he has a general property in the Goods, may recover in Trespass or in Trover or by any proper action, agt any Stranger, who takes away the goods or injures them, while in the bailee's possn. I hope to show, that this Rule is not universal. 5 Bac 164-260- Datch 214-1 Roll 4-2 Buls 268-3 Reeves Ris. Eng. D. 392.

Thus if I deposit Goods with B.; & C. injures or takes them away, the bailor may maintain Trover or Trespass or any action, the Case may require agt C. for ~~either~~ I. the bailor has not the actual possn. Yet in things personal, General Property draws after it, what is called a constructive possn. or a ^{posn.} in Law, which is as effectual in Law to support Trespass or Trover, as actual possn. 2 Roll 569-1 Sid 530 or 578.

I would observe, that a right ^{of present} possn. in any one, amounts to a constructive possn. or a ^{posn.} in Law, unless some other person is in actual possn. under colour of title, i.e. adverse title, or constructive possn. or possn. in Law being the same thing. Thus in the case above C. has a right of present possn. He may command the delivery at any time. B. is not in actual possn. under colour of adverse title. C. therefore has a constructive possn. & one or the other is indisputably entitled to an action for the injury done. This I take to be the true construction & on this principle the bailor may recover in the case stated.

(So if a Watch be lodged with a Gold smith to be repaired & it be taken away, the

Bailor may maintain Trespass or Trover for the goods right Bailmt
to Countermand the delivery.

Suppose Goods to be lent Six
Months & then to be paid the Renter, & further suppose with-
in six months they are taken away. Can the bailor
maintain Trespass or Trover for them agst the wrong-
doer? 4. M. 409 7. M. 9. 1. M. 400 B. & P. D. 385 8. John 432. Bul-
68. B. & P. D. 576.

That the bailor may maintain an immediate
action there is no doubt; whether the bailor may main-
tain any, & if any what, is the question.

But if goods are wrongfully taken from a
Depository or injured while in his possession, the bailor
may doubtless maintain an action immediately, for he
has a constructive possⁿ which is a right of present
possⁿ. - And this rule holds I trust in all cases where
the Bailmt. is countermandable at the pleasure of bai-
lor, for here he of course has a right of present possⁿ. 5
Bac 164-260- Latch 214-1 Roll 4-3 Recover His. Eng. Law
392-2 Bul 260-

It is said in the books, that if the bai-
lee gives the goods to a stranger, the Bailor cannot main-
tain Trespass agst the stranger or donee, nor in the first
instance Trover, i.e. he cannot maintain either un-
till demand made, when a refusal amounts to a con-
version, the original taking being lawful. 5 Bac 164-
261- 1 Roll 606-7- 1 Bac 237-242.

But according to a late case this
doctrine would appear questionable for the delivery of
the goods would itself be a breach of trust. In the
case before cited of the Factor pawning the goods of his
principal, it was decided that the principal might
maintain an action agst either the Factor or Pawn-
ee without tendering at all for it was a breach of trust

or a misfeasance amounting to a conversion 7 East 5.

And yet it has been determined that if goods are given to a stranger & Trower be bro't. for them in the first instance, it will not lie, & this I conceive to be a more flagrant breach of Trust than the Knowing. These decisions cannot be reconciled & it would seem that this latter one relating to the gift is exploded. & if any rate after demand made & suff. evi. of ownership exhibited on refusal to deliver by bailee's donee, the Bailor may unquestionably maintain Trower. 1 Bac 242- 1 Roll 106- 2 Ray 267- 1 Root 58.

So also it is agreed that most bailees & I conceive all bailees without exception may maintain Trespass or Trower, or any other proper action, the case may require a just wrong doers for the full value of the goods. (S. Common Carriers, Special Carriers, the Shipping Farmer, Purveyor, Hirer or Borrower. These no doubt have the right for the bailee in each case as between himself & a stranger may be considered as the true owner & is to be declared as such in his action for he has a special interest or right of possession which confers it & he may therefore maintain the action as well as if he were the true owner. 5 Bac 165- 269- 2 Ray 276- Bull 33- Keeling 39- Salk 143- 1c Mod 31. Rep. 577.

In the same principle, the finder of goods may maintain Trespass or Trower ag't a stranger, who injures or wrongfully takes them. Thus in the time of D. King, a boy having found a Jewel, went to a Jeweller to know the value, who deceived the boy & purchased it for a mere song. The boy then by his next friend bro't. Trower & it was sustained, because the boy came lawfully into possession by finding & he who has lawful possession has a right to retain the goods ag't all but the true owner Bull 33. 1 Stra 505- 1 Bac 346- Rep. D. 575-7.

I am it then, he said, that a depositary or a mandatary is not held by the strict conduct of the bailor has a less interest than a finder or who may recover merely because he has possession of right. In finding & hence they have a less interest or more slender title to support an action?

But it is said, that the ground of the bailor's right to sue for the full value of the Goods in any action is his own liability, due to the bailor & therefore, it is said, that a depositary or a mandatary, under a general acceptance, who is liable only for fraud cannot maintain any action. This appears to have been Lord Coke's opinion & has been adopted in most of the abridgements. Co. Litt 89- Sid 438- 13 Co. 69- 5 Bac. 164- 5- 262.

Now in the first place with regard to this reason it is not true in point of principle i.e. the actual or possible liability of the bailee even to the bailor is not the ground of action & if it were the ground of his right of action he would have a right to recover as any other bailee has. For 1st every Bailee has a special Property in the thing bailed, when he is liable over to the bailor or not is not material - it is his special interest; his rightful actual possession that gives him his right of action; as can be shown by every analogy in Law. 7 ER 342-8- Jones 112- 1 Bac 246. These authorities & many more might be adduced show that every bailee has a special interest & that united with the lawful possession give him the right of action 1 Bac 346- 5 Bac 262- 7 ER 346-8- 2 Esp. D 575-7. 3 Tra. 505.

In the last cited viz: Strange, is the case of the Finder. There the case of finding is emphatical; he there says that the finder has such a property as will enable him to keep the thing against all but the true owner & consequently he may maintain trover. This special interest which is the ground of his action is his only, as he has the legal possession.

But there are other analogies which are strong in favour of my opinion. By the Stat. of Winchester, commonly called the Stat. of "Hue & Cry" it is settled that a mere servant may maintain an action agt. the Hundred in which he is robbed of his Master's goods & yet the authorities are all agreed that the servant is not liable over to his Master - so that here the liability is not the ground of his right of action 4 Mod. 404-434 - Com. 4. 627 - Comb. 263:4 12 Mod 54.

It is also settled that a mere servant may have an appeal of robbery (this is a criminal process) or a writ of Felony & yet he is not liable over to his Master unless he is himself guilty of Fraud 13 Co. 69 - 2 Jan 180 Jones 129-130.

So also it has been very recently settled in the C.P. that an uncertificated Bankrupt having acquired goods, since his Bankruptcy may maintain an action of Trover for the goods agt. the wrongdoer. tho' altho' all this property belonged & would go to his assignees - yet the lawful poss^r which he had was deemed a sufficient foundation for the action. 1 B & P. 44. 7 M. 396-7 This decision goes to show that any bailee may have ad. agt. any wrong doer. B.P. ... Again where a house, that was leased was blown down by a Tempest, it was determined that the Lessee could maintain Trover for the timber of the component parts of the house after they were separated by the Tempest, the general property was in the Reversioner yet by the Storm the house was converted into a chattel interest & the Lessee into a Bailee. Here then is a very strong case the Tenant or rather Lessee was not liable for the loss occasioned by the Tempest, nor was he under any obligation to defend or keep the timber & yet he sustained the action. 8 M. 575-7 - Bull 33.

Indeed I take it to be well settled that a Special Property or a property, which is implied in law (ful) possⁿ, is suff^t to found the action of Trover or Trespass ag^t wrongdoers. The Rule is laid down in so many words in 7 R 297.

It appears to me, that there is no necessity for resorting to the question of Bailee's liability over, in order to determine whether he can recover in Trover or Trespass ag^t the Wrong doer. The true ground then is as I think, I have demonstrated, that as ag^t the wrongdoer or all else, but the true owner, the bailee is in the same position & it is not for the wrongdoer to say, that he is not.

IInd Granting that the Bailee's Right of action is founded on his liability hardly possible, to rec^dunt over to bailor & may be actually subjected. & how when the bailee's liability over is spoken of we are to understand by it nothing more, than his possible liability, for his actual liability in any given case cannot be tried in an action between the Bailee & wrong doer & if it could, it would be futile, for it would not be binding on the bailee in any event, nor on the bailor in the other, their relative right cannot I repeat be tried in an action between bailee & a wrong doer. All Bailees of a particular Class are not always liable. A Depository or a Mandatary may be liable certainly & it is equally certain that other bailees may not be liable. It is very clear that on this ground the right of a Depository or Mandatary is precisely like that of all other Bailees - for being indisputably accountable to the bailor & in ^{fact} subjected in the same manner as a bailee - he is entitled to an action as any other bailee.

Again the Policy of the Law & general expediency require, that every bailee whatever should have a right to sue a stranger or wrongdoer. For it is not uncommon

man that the bailor & bailee reside at a distance from each other, sometimes on diff^t Continents; in such cases if it is a distance that shall take the goods from the bailor's possession, shall it be necessary to send across the world to procure a power of att^y from Bailor to sue him?

The next Rule in the title in aid of my argument viz: If a Bailee deliver goods to a stranger, it is an agreed point, that the Stranger may maintain an action ag^t any one who injures or takes them away; yet what is the but but a Depositary? The goods are delivered him for mere custody. This then comes directly in the teeth of the Rule, I have been contending ag^t 1 Bac 242-250 Bac 260. Roll 607.

It is an agreed point; that an Auctioneer or Broker may maintain an action in his own name, on a Contract made for Goods sold by him to a purchaser & this Rule holds altho the purchaser knew who owned the goods. As a General Rule where a Servant makes a Contract in the name of his Master; The Master & not the Servant must maintain the Action. W. Chitty assigns as a reason of this diversity, that the Auctioneer has an interest by way of Commission in the goods sold. I believe however, that it is because he makes the Contract in his own name. 1 Ch. & P. C. 5-1 HBl. 81- 2 Ib. 591.

It follows, then, a Factor may maintain an action ag^t any one who purchases under him, both reasons undoubtedly exist. So also a Ship's Master may maintain an action for Freight. These Agents contract in their own name & must from necessity be allowed to sue in their own name, for their Contractors & purchasers generally reside in foreign Countries. The Rule is the same as to a Broker, the substantial reason in all these cases I take to be that the Agent contracts in his own name (See Tit. Master & Serv^t.) Bull 170- 1 HBl 82. 2 Ib. 591- Park. Int. 113.

Thus you perceive that under certain circumstances Bailor either the bailor or bailee may maintain an action ag^t the wrongdoer for the full value; That, sometimes either Bailor or Bailee may bring such an action tho not both, yet it is not always, that the bailor may have an action. And the Rule thus qualified holds under whatever description the case may fall.

Tho. the bailor & bailee may both have a right to sue a stranger yet there can be evidently but one recovery for the full value. When then the Bailor brings his action in Trespass or Trover & recovers the whole value, the pl^t. ^{as bailee is presumed to} cannot recover in either of those actions for the full value; But if the bailee has recovered, the bailor cannot recover at all.

The Rule is not precisely alike in both cases; the difference is, that after a recovery by bailor of the full value, the bailee in a diff^t action may recover for his special damage, but not the full value 13 Co. 69-5 Bac 165-263-2m?

The Rule laid down in Roll is that if both have an action, pending at the same time, he who first recovers ansts the other of his action. & I have apprehend the more correct Rule to be, that he who first commences his action for the full value will anst the other of his action of the same nature. For by commencing the action the party attaches in himself a right of recovery which precludes the other party. This rule appears agreeable to analogy. 2 Roll 569.

Thus when a servant is robbed, the Lord, or the Master may have an appeal & he that begins first shall recover & prevent the other of his action. 3 Bac 554- Satch 127. This where true rule is found.

And if the bailor has recovered satisfaction of the wrong doer, he clearly cannot have an action ag^t the bailee even when the bailee has been in

guilt, as by expensing the goods to insure or loss; for the Law allows but one satisfaction for the same thing - generally the C. J. allows but one recovery in any case. 20 Reg 1217 - Crat. 24 and 35 - 3 Deco. 124 - Salk 11 - Hyl. 60 - Esp. R. D. 319. 5 Bac 280.

The Rule just laid down is entirely correct, but I think it might have been laid down more strongly & made more extensive; for if a bailor first commences an action agt^t the stranger or wrong doer, he isse facto discharges the bailee, or in other words waives his remedy agt^t the bailee. I find no authority or absolute precedent for this, but if the bailor by commencing his suit can preclude the bailee from having one agt^t the wrong doer, it certainly ought to be the rule, for it would be extremely unreasonable to expose the bailee to an action at the suit of the bailor when the bailor had himself deprived the bailee of his indemnity as by commencing & discontinuing a suit agt^t the wrong doer when perhaps too he has become a Bankrupt. (3 R. 65. This aut^o is put here by mistake.)

Besides it is supported by analogy. Thus: in a case of Rescove, the plt. may sue either the Shff. or the Rescuer at his election, but if he commences an action agt^t the Rescuer, the Shff. is discharged. The situation of the Shff. in that case is very much like that of the bailee he is the keeper of a Pledge viz: the debt's ready, & the rule it would seem should be the same in relation to both. This Rule is inferable from authorities & is laid down expressly by Espinasse Esp. C. 610. Int. 90 - Cro Ch. 97 or 109.

And there are many analogous cases in which the party having an election of two remedies must decide by the one, he chooses & not abandon that for another 5 Bac 179. Salk 248 - 12 Mod. 663-4.

But it is otherwise, if the bailor first commences his action agst. the wrong doer for the full value, he thus makes himself liable to bailor at all events, this rule however presupposes, that he who first commenced such action is in fact out of the other of his action of a similar nature & follows clearly from it. For if the bailor takes the remedy from the bailor he ought at all events to be liable himself. 32 R. 65.

But altho' the bailor first commences an action & even tho' he has recovered, yet the bailee may have a special action on the case for his special damage if he has sustained any.

Now there are many cases in which a bailee can & many where he cannot receive special damage (a Mandatary or Depositary cannot receive special damage) by the injury of the article bailed, or by being dispossessed of it, in as much as they receive no benefit from the possⁿ.

But not only a Pawner, but a Hirer or Borrower may sustain great special damage in that way & they may maintain an action for it distinct from the action by the bailor to recover the full value & as before observed, this action by the bailee is not prevented by a former recovery by the bailor of the full value. There is no precise case in the books but the principle is very clear, for it is well established, that where one does a wrong act, involving what is called *damnum injuria* to another, the sufferer may have an action for the special damage. 32 R. 65.

If the bailor himself take the property wrongfully from the bailee, as before the time agreed upon has expired or the purpose accomplished, the Bailee may have a special action ^{on the case} agst. him, for he sustains an injury in consequence of a wrong act done in violation of the Bailmt. I apprehend however that he cannot maintain

Trespass or Trover for these are actions to recover the full value of the goods tho' the contrary is laid down in Coke & adopted by many writers since. 5 Bac 185-266 - Esp. D. 401- 13. Co. 69.

Now the reason why he cannot maintain Trespass or Trover is, that his special property is the ground of his action & his special loss the ground of his damages. It is true, that this special property gives the bailee a right of action ag^t 3^d persons for the full value & ag^t them only as I conceive, as to such he is the true owner & they are not competent to deny it - as to them he has the gen^l property, but not as to the bailor. And there is certainly no propriety in allowing the bailee an action ag^t the bailor to recover the full value. That this is the bailee's relation to strangers vide Stra 505-Esp D 575- 1 Ves. 359-61.

Now as between the bailor & bailee the latter has a special property entitling him to the custody & use, & this is the extent of the bailee's right ag^t the bailor, but as ag^t wrong-doers, he is gen^l owner & recovers full value in behalf of the Bailor.

According to Coke's Rule the bailee may bring Trespass or Trover & the ownership of def^t. The Bailor will go in mitigation of damages, but I conceive, that in all cases where full damages are sued for, i.e. full value, the plf. is entitled *prima facie*, to an action to recover the whole value.

So if goods taken are returned it will go in mitigation of damages & so in all cases where damages are mitigated by any thing *ex post facto*.

But in the present case the bailee had no such right originally or at the time of injury done & this is what distinguishes it from those cases - But there are still stronger reasons why the bailee cannot bring Trespass or Trover, viz: that in an action ag^t the bailor the real value of property furnishes no rule of damages, even presumptive, the special damages may be much greater than the value, why then should he bring an action in which the Real value is *prima facie*, the Rule or Measure of damages.

Equally the injury may be less, than the full value of the goods. In such case D. Coke says the damages may be mitigated down to the actual injury, if so, it is a very late, a very awkward & incongruous mode of the remedy.

The reason why the bailee sues in any case for the full value is that he may recover for the benefit of the bailor, but in this case the bailor has secured himself by taking pass^{ts} & has also injured the bailee; so that in this case the bailee does not sue for the benefit of the bailor. I make these observations because I think D. Coke's Rule incorrect, still however it may be & I suppose it is now considered as Law, tho. I think it clearly opposed to principle.

If a Bailee delivers property to another in violation of bailor's orders, he is *ipse facto*, guilty of a conversion or misfeasance amounting to it & Trover will lie without demand. For Trover lies, for an unlawful taking user & detainer. This is an unlawful user
4 T.R. 260 - Esp. D. 531

As a General Rule the Bailor can maintain no other action ag^t the bailee, than detinue or an action on the case. He may bring the ac-

cient C^g. remedy of Detinue, but that action is now dis-
used, & succeeded by a Special action on the case for
negligence or omission of duty required by Law. Tro-
ver which is an action on the case for conversion or
assumpsit founded on the promise express or im-
plied to keep with care & redeliver. These ^{as to} ~~in~~ ordina-
ry cases are the only actions he can bring ^{as to} the bai-
lee 1 Bac 237-8- Bull 72- Bro J 244- Bro & 781-

And when the goods are lost or injured by neg-
lect of bailee, the bailor may sue the bailee either
in Tort for the neglect, or in assumpsit on the a-
greement, express or implied, but not in Trover
because mere negligence can never constitute
conversion which consists in misfeasance or pos-
sation Tort altogether, & not in nonfeasance mere-
ly. 3 East 62- 1 Will 202- 2 H. 319- & 10 And.

But in general Trespass never lies by bai-
lor ag^t bailee, tho' Trover does, because the origin-
al taking was lawful: so that the bailor has neither
the actual nor constructive possⁿ. But there is an
exception to this Rule in case the bailee should
wantonly destroy the goods, he would be liable to the
bailor in Trespass for by that act he distinguishes the
Bailment or as Lord Coke says he is presumed to have
rec^d the goods for the purpose of destroying & not of
keeping them. As an adjoining farmer kills the sheep
bailed to him to Pasture. I once heard a case cited
to this effect, "that if the bailee sold the goods the bailor
should maintain Trespass," but I never could find
it. 8 Co. 146- Park^r 191- 5 Co. 136- 1 Inst 57^a- 2 Roll 55-
2 TR 466- Contra 5 Bac 266- where it is said that
the bailor cannot maintain Trespass even in this case,
however not law. Moor 258.

264.

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VI. Inns & Innkeepers

This title is closely connected with that of Sailmⁿ, which precedes it & in the course of which most of the principles relating to Inns & Innkeepers have been noticed.

& It (B. L.) any person may exercise the employment of Innkeeper, unless the number of Inns becomes so great as to be inconvenient to the Public for by the C. L. Inns are established without License. The H. of the U. States & of Ct. & I believe of most of the States require such persons to be licensed. 2 B. & C. 1701 9 - 1 Roll 84 - 6 C. 3 594 - 4 M. 374 -

And it follows of course that he who assumes the character of an Innkeeper becomes liable to its duties & duties.

But Inns or Taverns from their inconvenient numbers may become nuisances to the public, & the keepers may be indicted at C. L. as Common Nuisances. You will readily perceive that this will not be the case where the Innkeepers are Licensed according to stat. 4 B. 160. 6 C. 3 549 - 2 Hals P. C. 174.

So also a disorderly Tavern may be considered as a Public nuisance & the keeper indicted for it as such, independent of any reference to numbers. 21 Hawk 190 - 225.

In Ct. no Inn can lawfully be established unless licensed according to Stat. The Rule is the same in most of the States I believe. As to the mode of appointments &c. vid. Stat. Ct. 640. And by our Stat. the keeper of any Inn without License, is punishable by a Fine, which is doubled or increased in geometrical progression for every repeated offence. Stat. Ct. 646.

And there is a temporary law of the U. S. requiring all Innkeepers to obtain a License; it is not a law regulating the establishment of Inns, that is left to the in-

dividual States, but being & exercising the employment of Innkeepers, they must obtain a License. It is indeed, one of the sources of Revenue by indirect taxation.

The Stat. Laws of Ct. provides, that the civil authority or selectmen may suspend or otherwise punish Innkeepers &c. Stat. Ct. 643.

Such Proceedings do not, I trust, affect the Ct. process. by indictment for keeping disorderly houses, for there is no such express provision in our Stat. & such a Ct. provision ^{or right} is not in general to be construed by implication.

The duties of an Innkeeper extend only to the entertainment of Travellers generally speaking, & keeping their goods & their Animals, they travel with. 3 Bac 100. 9. 10. 87.

And if an Innkeeper refuses without sufficient cause to keep a Traveller on reasonable price tendered (for he is not compellable to trust his guests) he is not only liable to an action on the case in behalf of the person injured, but also to an Indictment, it being disorderly behaviour, thus to frustrate the end of their Institution 4 T. 6. 4 Bl 160-1 Hawk 225 3 Bac. 81. 4 Bl 160.

The care required of an Innkeeper does not extend to the person of his guest but to his property only, i.e. he is not bound to protect him from the violence of others. & Innkeepers are bound no more than every person in the community to prevent a breach of the peace & hence if a guest is beaten at an Inn, the Innkeeper as such is not liable 8 Co. 32. 3 Bac 101.

If an Innkeeper himself, or by his servants, deal out to his guest unhealthy food or liquor, he is liable to an action on the case 1 Roll 95. 3 Bac 102.

The principle rules in relation to an Innkeeper's liability for the goods of his guests have been presented in the title of Bailment, for as respects the goods he is strictly a Bailee. There are some additional Rules however

which I am now to notice.

This liability in this respect is not discharged by absence or sickness or even insanity. This strictness is founded in policy to guard guests from fraud. This absence might be on purpose to defraud or avoid liability for intended mischief. His sickness or insanity might be affected, & at any rate he is bound to provide agst. such contingencies. Besides the opportunities he has to defraud & pilfer make strictness in these Rules indispensable. Bro. & 622 - 3 Bac 102.

An Infant Innkeeper is not chargeable like other Innkeepers, i.e. ^{as legal age} for he cannot make the contract express or Implied on which all Bailw^{ts} are founded; he might however be subjected for Fraud or Violence or, any Positive Tort, but not for omissions or mere negligence, for the law will not allow his privilege to be thus infringed on the ground of Public Policy. 1 Note 2 - 3 Bac 102.

If an Innkeeper has not the convenience to accommodate, as that his house is full & the Traveller persists in staying & taking his chance, as the saying is, the Innkeeper may be liable like other persons for positive Torts or misconduct but in such case he is not liable as Innkeeper & if the goods are lost or injured as in the case of a Common Carrier under such circumstances the owner must bear the Loss, occasioned by his own folly Dyer 138. 3 Bac 103.

It has been made a question whether, if a Host requests a Guest to lock his apartment & his goods are stolen, because he did not, the Host is liable for them? The opinions appear to be divided. 3 Bac. 183. Dyer 266 e Hoar 70. 158.

In my part I should think he ought not to be liable; the request is certainly very reasonable & should

he obeyed. There may be many in the Tavern unknown to both & if he does not lock the Door the Host ought not to be liable, unless it were proved that he were privy.

Merely delivering a Key to his Guest does not discharge host - This is merely giving his guest an opportunity of securing his property, it being supposed, there is no intimation of danger, or request to lock the Door. But it is too much to say, that an Innkeeper ought to keep a guard over every apartment, when he has requested the guests to lock their Doors. 8 Co. 33^b 3 Bac 103.

An Innkeeper is liable as such tho' ignorant of what his guests affect, may consist tho' if he were deceived as to their nature by misrepresentation I should suppose his case would be like that of a Common Carrier, which I have before considered. 11 Auth. & 5 M. 273. Moor 158.

As a General Rule Innkeepers are liable as such, only to travellers & such as stay at their houses in the character of guests & at the price usually charged to Travellers, he is not liable to his Neighbours even tho' they should lodge at his House, as in case one lost his Hat or Can, Nor the Boarders properly so called, who live with him & pay the price charged at private houses. For there is no reason, why a Boarder should have a higher claim against him, than against any other man in whose family he may board. The Host in this case is not in the character of an Innkeeper & cannot be liable as such. 8 Co. 32^b. 1 Roll. 3. Skin. 276- 3 Bac 103.

Besides the policy of the Law does not extend to him, for one who lives in the house himself as a Boarder can judge for himself of the character of the Innkeeper.

An Innkeeper is not chargeable in the absence of the

owner for any goods for keeping of which he receives no inn profit. By the owner's absence here is meant such an one as divests him of the character of a guest; for the Innk Innkeeper is liable as such only in consequence of the relation of Innkeeper & Guest. 1 Role 3 - 330 - Bro. J. 108. Salk 300 - 5 M. 273 - Day 126 - Oppl. 179 - 3 Bac 103.

But for goods for the keeping of which he receives a profit he is liable, altho the owner has left the Inn & is not a guest as to himself personally, for as to the goods the relation does continue. & if a traveller should leave a horse which it is profitable for the Host to keep, for the purpose of changing his manner of travelling perhaps. Bro. J. 100 - Salk 300 - 1 Role 3 - Day 126 - Moor 877.

And when the goods of a man are in possession of his Servant & taken by him to an Inn, the Innkeeper is chargeable to the Master precisely as if the owner or Master himself were the guest. Bro. J. 224 - Oppl. 162 - Day 158 - 5 M. 273.

As to the Remedies an Innkeeper has ag^t his Guest, I have already partly stated the Rules to you. An Innkeeper may detain the person of his guest until the whole bill be paid & if the Guest leaves the Inn without paying his bill & without permission the Innkeeper may pursue & take him, & as I have no doubt he has the same remedy, altho the guest flies into a neighboring State - For it has been determined in Ct. & by that Bail may retake the principal in a neighboring State with a Bail Piece. For C. J. Rule in 2 Role 85 - 3 Bac 105 186 - Salk 300 - Car 150.

He may detain the horse for the expence incurred in keeping the Horse, but not for any other part of the guest's bill, this is according to the Genl. Rule in Relation to Lien on Personal Chattels. 1000. 134.

But altho he may detain the horse of his

guest yet he cannot use him, for he is in the custody of
 Law, is like an estray Distress for Rent or Damage Faus-
 ant &c. & if he uses the horse or other animal at all the
 very act will make him a Trespasser ab initio & he is
 liable to an action at the suit of the guest, for the De-
 tainer is a Process in invito & compulsory, for which the
 law gives the Innkeeper a License, & when the law gives
 a License & the party abuses it, he is a Trespasser ab
initio & may be sued in the same manner as if the
 original undertaking had been unlawful & by force. 3
 Bac 105 - Stra 556; Moor 877-

He cannot sell the Horse. Ib. auths.

VII. Executors & Administrators

(By Judges Jones & Gould.)

General View. By G. D.

This subject will include in it all estates of deceased persons of a Personal nature for it is the duty of the executor to see to it; and if by Will it is the duty of the Ex^r to see to the disposition of all Legacies.

To get at the idea of an Ex^r or a Admin^r we must suppose the person to be dead & for one to hold his estate; Where one is dead, if he has left a Will, that Will is the law as to the disposition of the estate. But when there is no Will, the law points out who shall have the estate.

The law has pointed out a different course for the disposition of Real & Personal. No better law will show the manner in which each is disposed of at Ex^r. There is however almost a complete revolution of the Ex^r principles in the United States.

The Real Estate goes directly to the heir if there is no Will & as effectually, as if the heir had it conveyed to him by a valid Ex^r.

If there is a Will it goes to the Devisee, he or she who may. Personal property never goes to the heir as such - he holds the land indeed as his Ancestors did; but the Ex^r or Admin^r holds the personal property, as Trustee, in the first place to pay the debt; in the next (if there is a Will) he is trustee for the legatees upon the principles of the Ex^r, agreeable to the maxim that a man

must be just before he is generous: So that the Legacies must be an after cost, & if enough assets remain there will be paid.

The Real Property we have said goes debt-ly to the heir & of course it cannot be come at, through the medium of the Exr. to pay debts: this is a great defect of the C. L.

But by H. 5 Geo. 2. The estates in foreign plantations are liable to Simple contracts as well as Specialty creditors - such then was the Stat. law here before the Revolution. 2 Woodd. 377. note.

The heir however as devisee is liable to pay Judgment creditors, for lands when they pass to an heir, pass with this Liab. upon them. Specialty creditors may likewise come upon the heir.

The heir or devisee was not liable however personally, so that should he sell immediately sell to a bona fide purchaser, the Specialty creditors would as the law stood have lost their debts. But a Stat. has been made to remedy this, by providing that the heir or devisee should be personally liable. The extent of this liability is to answer judgments & Specialty Creditors.

Exors & Adms^{rs} are liable to the extent of the assets -

See Marshalling Assets in Chancery.

as the English Stat^s have mitigated the rigor of the C. L. I have mentioned. All the residue has been done by Chancery. Chancery will allow the Simple contract creditor to go agt. the heir, for so much as the Specialty creditor might have gone agt. him for, & for no more. The remaining Simple contract debt or credit must be lost if there is no asset.

Personal Property is a funded liable

for all debts; Real Property is a second fund liable for Just, ^{Exec} & Specialty Debt & by the Stat. the person of the heir or devisee so far as the lands are. Chancery goes still further & makes the Specialty creditor go agst the heir, or what is the same thing. Let the Simble contract creditor when the Specialty creditor have gone agst the Exors &c) stand in the place of the Specialty creditor 6 Ms. B. 150. 4

The C.L. is here very defective & even with the aid of Stat. & of Ch. does not now seem to do complete justice. In the United States generally, this not entirely, have the defect been remedied.

What our Stat. have done in case of gift more of asset is done frequently in England by the testator, for he may by will make all his real property liable for the payment of his Debts. He may by his will empower his Exrs to sell his Real estate & this will be of the same validity as if he had during his life time given him a Power of Attorney to sell it; but this is optional with the Testator in England; whereas in Ct. we compel it.

But in England where a man devised lands in these words "I do hereby declare black acre to be sold to pay my debts"; it was held that it was not to be sold till the personal property was exhausted even tho; the personal property was entirely bequeathed in Legacies. But this construction does not prevail in the United States. The ground of the English construction was the anxiety which the Law always manifested to preserve the heir in his right, & all their decisions have been but in this country we have no need of such constructions.

Priority of Debts.

There is a priority to

be observed by Ch^r. when the assets he holds are all legal assets. But where there are none but equitable assets, all debt are to be paid alike.

Legal assets are such as arise from the sale of property which the Ex^r receives in the capacity of Ex^r. & which he can without any assistance convert into money.

Equitable assets are those to obtain the property of which he is obliged to have the aid of Ch^r. or for the possession of which he might have been obliged to pray aid of Ch^r.; as those which arise from the sale of lands &c. Chancery knows nothing of priority of debt in these cases, but directs all the debt to be paid out of this fund alike.

Where one directs in his Will, his Ex^r to sell lands, &c. the Ex^r cannot of course do it or perhaps he will not, or perhaps they are devised to another to sell them & he will do nothing about it. In all these cases as Chancery has to interfere before the lands are sold the assets are equitable.

An Ex^r is never liable beyond his assets - nothing are assets, but what are turned into money in his hands. If the Ex^r will not sell the personal property in his hands, or waste it, or sell it at an under value, he will be liable to an action for a Devastavit but not as Ex^r. Ind^y goes agt. the property of the deceased in his hands. If then, he refuses to pay or turn out property on a Sci. Fac. Ord. Ind^y will go agt. him per se proprius. Ind^y goes agt. him to the extent he has received & then will be paid to Creditors according to priority. An Ex^r or Ch^r cannot pledge pledge admin. intra act except in one instance.

In cases where specific as well as pecuniary Legacies are given, the legal title to the property vests in the Ex^r: The Legatee cannot take title. The Ex^r has given his assent. But if he has paid all the debts, so that he does not want them for assets & then refuses to deliver them, the Legatee, altho' they cannot recover the specific thing, may recover damages in a Court of Law, for withholding them.

Legacies are Requests of Personal property they are Specific & Pecuniary. They are Specific when an identified thing is given, as a house, bag of money &c: Pecuniary when a particular sum or quantity of Money is named without identifying it as £100. There is a difference between the situations of different specific Legatees, for Cases when there is not a sufficiency of assets without taking some of the Legacies to pay debts - must first take Pecuniary Legacies. And if all which were to pay pecuniary legacies is exhausted, & still debt remain, he may then take specific legacies. When the property of pecuniary legatee is taken, they must share in proportion to each one's legacy. Such part of share.

The Ex^r has the Will for his guide, when there is a surplus of property after paying all the debts & Legacies & it frequently happens that such surplus goes to the Residuary legatee. But if after all the legacies are paid there still remains a Residium, undisposed of by the will, to whom does it go? As if all the testator's lands are devised except one lot - This will & must be disposed of according to law, 6 Ms. R. 153. But where the testator meant to devise all & after ^{every} thing is paid a residuum remains, the notion which prevailed in the spiritual Court was that the Ex^r might take it for his services.

Upon the general principle Equity has made a great inroad. They show you on the principle that the Exr. should have it, if the testator had made no provision for him. If by will it is clear, that testator did not intend to give Exr. anything for his trouble, by an actual Premium in the will the Exr. shall have the residuum both in Law & Chancery. But if he is provided for by a Legacy, or Specific Bequest, he shall hold the residuum for the benefit of the relations of the deceased to descend according to Law.

If however it was clear that the legacy was not intended to recompense the Exr. for his trouble, as where it was given to procure a Suit of Mourning &c. he will still hold the surplus.

The legal construction of the will is left given the equitable. As in Law (they say) the Residuum is given to the Exrs. In Chancery if the Exr. is provided for, then it is distributed to the kindred; if not Exr. holds it as a recompense. This is called the equitable construction. But here parol proof is admitted to show that the deceased designed to provide for the Exr. by the residue. But Parol proof cannot be admitted to contradict the legal operation of the instrument. It may be admitted to rebut an equity arising out of an equity, when the equitable & legal construction differ, to restore the old legal construction.

It is a maxim that governs in all cases on this subject, that the intention of the Testator is always to be the Rule of construction, if consistent with the Rules of Law. The principal difficulty is to understand the intention of the Testator. next comes the construction.

The Rule applies not to the words used but to the estate given. If the testator used words which cannot apply to the estate (as where one entails personal property) the intention will be defeated for the law interposes to vest the whole estate in the first possessor.

If one gives an estate in fee simple & then directs that it shall not remain in fee simple during his life the provision is void, as inconsistent with the estate given.

If one adds a quality or restriction contrary to law, it is nugatory. But if he has given such an estate as he can give, in whatever words it may be couched if it is consistent with the intent of law & the intention is clearly known, the donation is good & the Will shall govern.

With respect to parol proof to explain the Instrument as to the intention of the testator; it is a general Rule that such proof is not admitted to explain the

A distinction is taken between a Patent & a Patent Ambiguity. If there is an ambiguity on the face of the Will, parol proof may be introduced to explain it; as where the Decisor had two sons of the same name parol proof may be admitted to show which son he had reference to; the ambiguity is here patent & even in these cases you cannot by parol proof make the construction contradict the Will. Again where a Legacy was given by an old maid "to the four children of my Cousin C. B. & C. B. had six children two by a first husband & four by a second & subsequent one. There was a necessity of parol proof & in the strength of it, it was decided, that the testatrix meant the four last - But she further gave more property to the children of her Cousin C. B. Here then if we should say that the four should have it the construction will not stand

with the will; of course it must be the *lit.* for all were the children of *E.B.* What then is the extent of the Rule? Merely to fact *dehors*? It can never be admitted to explain the sentences when they are obscure - If a will is so blind that no one can understand it, it is called & is *negatory*.

But when a Will is written without stops you may obtain the meaning of it by a view of the whole. This is a principle of policy as to sentences.

Still parol proof may be admitted to show the circumstances of a man's estate or family at the time of making the Will - & where a man made his will to give his Real estate to *J.S.* & his children: *J.S.* & his children take an estate as *jointenants*. But if *J.S.* has no children he takes an estate in *Tail*. Here we may prove by parol whether he had children or not. In this case "children" denote the kind of estate given & is equal to the words "Issue" or "Heir of his body". In the case of his having children they are descriptive persons. In all such cases of ambiguity it may be explained by parol proof.

The situation of the property may be shown to explain the meaning of the Testator: as where one had an estate in *Tail* in the *Bele Gouern* in London & in the reversion, in his will devised it to the same *in tail*. In the devise the devisee takes but a life estate when the thing is specified. But as he already has a greater estate it was construed to be the passing of the reversion. The fact of his having an estate *tail* was proved by parol.

We have said that altho parol proof cannot be admitted to explain sentences, yet it may be admitted to explain ambiguous words & by the way

ish law formerly when an estate was given "seniori puero" it was uncertain whether it meant the eldest child or eldest boy, as "puero" occasionally means either parol proof was admitted to explain the ambiguity. Exors & Adms.

Estate was once, tho now, an ambiguous word, as it was sometimes used to denote the thing & sometimes the interest conveyed. now it means not only the thing by name, but also the interest in it.

There may be a misdescription & yet the whole will taken together will shew the meaning. As where a man gave his estate to "John, now in the service of the Duke of Anjou" - his real name was William, but a proof of the fact the description was holden suff.

So where a man gave a nickname to his Niece, ^{so called} he by it in the will, which was "pretty Sue", on proof of the fact she took the Legacy - But had there been a person alive of that name, this niece would have been excluded. These things stand well with the will.

No Real estate passes by the will except what he had at the time of making the will; but all the personal property which a man dies possessed of may pass by a will, made previous to the acquisition of such property.

An Exr may have a beneficial interest in the estate after all the trusts in the will are performed, for the residuum cannot be collected out of his hands by process of law.

The Power of creating a Cestuy que trust in a qualified one, he cannot take, unless there is a residuum left after (left after) the creditors are satisfied, for they cannot be defeated by the debtor's donations - no matter what the form of giving is, or may be, whether it be by Deed or Bond &c. If the estate goes in.

to the hands of a volunteer by accident he cannot hold it as ^{st.} the creditors; but it will be called out of his hands by an application to Chancery. - A Volunteer is one who takes property under a will or by distribution of Essex.

The liability of an Essex to account strictly as such, extends no farther, than the extent of assets: Assets are not strictly the value of the estate, but what it brings, not the amount of the Inventory, but the avails in money of the sale of the property contained in the Inventory: Of course the assets may be more than the Inventory & may be less. The sum contained in the Inventory is *prima facie* the sum of the assets. But if they should exceed the Inventory, the Essex is liable for the surplus.

If fraud has been practiced in the sale of property, the Essex or Essex is not liable as such farther than the extent of actual assets. But he is liable for a devastant as any person would be & he is liable de donis propriis on account of Sorts, which in the other case judgt. in the first place goes in favour of the creditors as to the estate in his hands.

By Judges Reeve & Gould

Executors & Administrators are the representatives of deceased persons; as to their personal estate & as to their duties affecting personal estate of theirs. 1 Bl. on Comyn 139 - Co. Side 209th 2 Bac 439 - 3 Ib. 20 - 1 Com. Con. 522.

An Essex is a representative (ut supra) appointed by the will of the deceased. His duty as Essex is to execute the last Will of the deceased 2 Bl 500 3-7-15.

The intention of effecting is essential to the validity of a will. *Co. Litt. 111. 2 Bac. 242. Godd. 42. 2 Bl. 507. 20 Law. 24.*
 To make an *ad v.* it is not necessary that the word *bequeath* should be used. It is sufficient if the intention of the testator was to make such disposition *ad v.* as if he had said "I commit all my goods to S. &c." 1 Com. 234. *Goodless* 177. *Lwinb.* 247. 2 Bl. 507. *Godd.* 42. *Dyer* 90-1. *Offin.* 64. 8-12.

The disposition of personal property in contemplation of death, not containing the appointment, is called a testament & is a power in the disposition of personal property of the deceased. In some of the Books it is called a *Codicil*. *Winter* 2. *Lawless* 9. *Bac* 89-102. 3 Bac. 466. 2 Bac. 455. *Godd.* 271. Thus there may be a will without a testament & *vice versa*.

The naming an *exor.* is by implication a gift to him of the goods of the deceased, an *exor.* being named to pay his debts, & so the naming an *exor.* makes a will. *Id.* *ib.* *ib.* *Godd.* 202. or 82.

At C. L. a Testamentary disposition of the lands without naming an *exor.* was called a will; a *testator* in case of a *testator* a testament. but a testamentary disposition of lands is not so defined now. 5 Bac. 497. *Co. Litt.* 111.

An *exor.* is the representative of a deceased person, appointed by law thro' its proper organ or minister. 1 Com. 257. 2 Bl. 507. or 496. An *exor.* is appointed only in three cases viz: Ist When no *exor.* is appointed by the testator; IInd When he cannot act as *exor.*; & IIIrd When he will not act as such.

An *Heir* is the person appointed by Law to succeed to the Real estate on the death of his ancestor. 2 Bl. 201. The devisee is a person entitled to the Real property by the Testamentary appointment of the deceased. 3 Bac. 466. or 2 Bl. 466. *Godd.* 271.

Exors.

Admrs.

A Legatee is one who is entitled to personal property by Testamentary appointment. 3 Bac 466 - Godd. 271 - 2 Bl. 512.

The power of an executor or administrator over personal property is much greater than that of a trustee except so far as they may be entitled to it. Over real property they have not as executors or administrators any power for real estate was not originally Testamentary 2 or 3 Bac 392 - Off. & Ex. 3-4 - Doct. 21-22.

An executor may have the disposal of real property like any other person by express appointment of the testator. So if lands are devised for the payment of debt, the executor though not expressly empowered, is considered in Chancery the proper person to sell, no other being expressly empowered. 1 Atk 420.

But the executor as executor has no power in any case & neither of them as such have any right to the real estate. Paw. Dec. 299 - New. 525 - 3 Bac 407 - 1 Boon. 304 - Off. & Ex. 27-9.

A deed of land sold under a power of a court of Probate by an executor signed by her, ^{not} as executor & in which she is not named as such nor the person counted upon, does not pass the interest. Such deed was offered in evidence & rejected 12 East 105. How it would be in Ch. is not clear 109.

A Legatee receives (or inherits) his legacy ^{the assets of} through the executor & devisee takes possession without the intervention of the executor. Why so if the executor has the same authority over real as personal property? Doct. 93.

The personal property is charged in law with all the debt of the decedent. But the real is liable for debt by ^{or by legacies only} specialty. Doct. 93.

At Ex. or rather since the Stat. West. 2. Judgment debt burdens the real estate from the first

any at the time on which Judgt. was rendered & goods & chattel from the date of the Exon, but now by Stat. 24. Car. 2. they bind the land agst. bona fide purchasers only from the day on which Judgt. was signed, & the goods & chattels only from the date of the Exon to the officer 3 Bue. 24. 3 Bl. 420.

Exon
&
Adm^{rs}

By the old law Judgt. bound lands in the hands of the heir from the time of the original writ being purchased. Law. 93. 3 Bue. 21.

Specialty Creditors may resort to either the Real or Personal & if they attach the personal & it be not suff. To discharge all the debts, the creditors by simple contract are liable to cease all their demands, as they cannot take real estate, they are without any remedy at Law. 3 Bl. 430. Law. 93. 2 Bl. 377.

But in the last case Chy will relieve the simple contract creditors by letting them in upon the real estate for so much as the specialty creditors have taken of the personal property & now the simple contract creditors stand in the place of the Specialty creditors for so much of the real estate. This is effected by Chy ordering a sale of the real property in the hands of the Sheriff & the same indulgence is done to the Debtors. Talb. 53. 1 Mag. Cas. 44. 1 Ch. Cas. 45. Task 456. 3 W. 401. If the avails of the sale of real estate is insufficient, an average is to be made. The spirit of the Chy rules is adopted by our law, but our law subjects the whole of the real estate at all events to simple contract debts or creditors.

Of Creditors in equal degree he who first obtains Judgt. agst. the Ex^r is entitled to his whole demand even to the exclusion of the rest. 3 W. 401. And if one of the creditors of equal degree has commenced a suit, or bro't a Bill in Chancery, as the rule now is, the Ex^r cannot defeat the claim by paying the other creditors. 3 W. 401. Talb. 217. Bro. Ch. 207.

If land is devised to an Exr. for the payment of debts the Exr. cannot be sued at law for this reason, by a creditor, as having assets. 1 Com. 401. 1 Roll 920-2 W. 416 or 2. Vern 106. Nor can he be compelled at law to make sale of the land - land not being considered as assets in his hands so as to subject him at law. But Ch. will compel the Exr. to sell that even tho' the devise is not to him, if it be not to any other person. 1 Atk. 420-2 Bl. 510.

Assets What? 2 Bl. 510.

They are all such property of the deceased as his legal or personal representative holds for the purpose of enabling him to discharge those duties which have devolved on him as representative of the deceased.

There are two kinds of assets. Ist Real Assets which descend to the Heir & make him liable to such debts of the ancestor & claims upon him as bind the real estate. 1 Com. 390-9- 3 Bl. 22- or 32- 3. W. 254 2 Bl. 244. 302-40- 3 Lev 206- Car. 127. - IInd Personal Assets, i.e. such property of the deceased as comes to the Exr. & as such makes him liable to creditors & Legatees. Ib. ant^o & 2 Bl. 510-

Again, Assets are either legal or equitable. Legal are such as go in a course of administration, i.e. according to the order or priority of debts. Equitable assets are such as are distributed among all creditors equally. Pow. M. 125-129- 1 W. 430- Pre. Ch. 179- 2 Atk. 412-

An Equity of Redemption of a Mortgage in fee are equitable assets, for at law, the whole estate is forfeited. Pow. M. 124- 2 Atk. 294- 3 W. 341- 3 Bac 33- 2 Vern 161 or 141- 1 Vern, or Kent 411. So an equity of Redemption in case of any mort. whether in fee or not is equitable assets; but in case of a mort. in fee the Mortgagee has no other than an equitable interest, because there is no reversion. But if land in fee be mortgaged for years, the reversion in the Mortgagor is legal assets & the creditor may have Judgment.

as to the Heir of the Mortgagor of assets "quoad assets." i.e. there is *Core*
 a stay of action, till the Redemptioner comes into possession. *Re*
M. 125 - 1 Vern 510. & 410 - 2 Ib. 134 - 3 Atk 354 - 2 Atk 294. There *And*
 is no version expectant on an estate Tail is no assets. 3 P.W. 235
 & Pow. 443.

There is a contrariety in the authorities as to the qual-
 ity of assets arising from the sale of lands devised to be
 sold (tho' not as mortgage) for the payment, whether they are legal
 or equitable. 2 P.W. 16ⁿ. or 416. According to most of the older
 cases, money arising from the sale of lands devised to, or
 subject to the power of the Ex^r. to pay debts &c are legal
 assets upon the principle that whatever comes to the hands
 of an Ex^r. as Ex^r. are legal assets. 1 Vern 42 - 2 M. 156. 448.
 405 - 1 Cr. Ch. 127. 36 - 2 P.W. 416 - 552 - 1 Atk 420 - 1 M. 331 - 1 Lw.
 224. Hard. 505.

Yet the latest cases & some of the old ones consider
 the Ex^r. in the double capacity of an Ex^r. & Trustee & have
 avoided themselves of the latter character & have held the as-
 sets to be equitable. Finch 196 - 2 Vern 133-4 - 1 Atk 484 - 3 M. 50.
 Bro. Ch. 135 - 40ⁿ. 1 Atk 420 - 1 P.W. 179 - These cases seem
 to have overruled the old authorities. R. S. 331.

Money raised *as supra* by Trustees is equi-
 table assets by reason of the power of Ex^r. over proper.
 Trustees 2 P.W. 416 - 2 Vern or Vern 133-4 - 2 Atk 50. R. S. 331.

But it has been holden that where lands have
 been charged with the payment of debts, tho' they descend to the
 heir & are not delivered, i.e. when the intent does not pass
 by the devise, they are legal assets. 3 Atk 630 - 3 Atk 127ⁿ.
 3 Bac 27-33 - For the Stat. against fraudulent Devises has
 given the Creditors in such cases an ac-
 tion of Debt at Law ag^t the Heir of the Obligor. 2
 Atk. 293 - 2 P.W. 134 - 1 M. 430 - 2 Ib. 416 - R. S. 331.
 In conformity with the last Rule it has been holden that
 money arising from a sale of Lands under a bare power

to sell for the payment of debts. Should he leave assets, because the land descends the descent not being broken, but it is otherwise if the interest passed by devise. 1. Str. 434-435 or 1 How. 430; 3 H. 630 - 1 P. W. 430 - 2 R. S. 331.

This distinction is however avoided or exploded by D. Charles, who held that the descent was broken by power to sell, as much as by a devise to sell, conveying the interest by express words. 1. Bos. & L. 135-7-40th Co. L. 112-13 2. Hod 206 - R. S. 331 or 331.

Debts descending to the Heir are to be applied to the payment of bona fide creditors before lands specially devised (specifically) can be taken. This rule is reversed when the lands are devised for the payment of debts. 3. H. 556.

If the Testator charges debts on the heir & creditors resort to the personal fund, the Exor. may come upon the heir for the amount taken, i.e. when the Testator's intention is that the personal fund shall not be diminished. This rule is distinct from the former one, when the personal fund was, or is exhausted by bond creditors. Simple Contract creditors are allowed to resort to the heir - a rule which obtains where there is a deficiency of personal assets. R. S. 50.

The Heir as before remarked is liable for specially debt to the amount of his assets, yet the obligor may if he chooses sue the Exr. 3. Bos. 25. Now 441. 3. Co. 12 - 3 L. 109 - Exp. 24-8 - Str. 605 - So the obligor may sue heir for a part & Exr. for the remaining part, but if he recover a part, as to the other may be recovered by an *actio in rem* 3 L. 109-5. 3 Bos. 25.

Exors & Adms^{rs} are bound by the contract of the deceased though not named as far as they have assets, unless when from the nature of the contract, they must

he performed by the testator in person. Dyer 14 - 2 Bac 443 - 3 Hen. 6. Exce.
117 - 6 Geo. 553 - Wood. 107 or 503 - Volo. 142 -

and
Adm^r

The Heir is not bound even on special contract
unless expressly named because according to the old Eng-
lish law, no other than waste chattel & animal productions of
the land (not the land itself) were liable to Exor on the personal
contract of the ancestor or Tenant. 2 Bac 443 - 6 Geo. 553 -
Dyer 14 - Hen. 440 - 2 Bac 329 - Hob. 60 - 2 Pl. 400-1 - 3 Pl. 410 -
In a 4th case up^t the Heir if it necessarily raised a special
that the ancestor bound him Rob^t 4. 706 not 2 Bound 136.

The body of a debtor was not originally liable on
Exor & he taken. Hen. 44. Hob. 60 - 3 Bac 328-9 - Hen. 130.

The land is appraised to the creditor not in fee,
but the rents, profits &c. shall have discharged the debt. The
land is liable in the hands of the Heir, because if it were other-
wise, the action of debt, allowed at C. J. up^t the Heir
would be useless. This is the only instance in which land could
be taken in Exor, founded on Personal actions at C. J. in
behalf of the subject. But the King may always take land
in Exor, on deficiency of personal assets. Hen. 449-439 -
441 - 2 Bac 329 - 3 Bac 25 - 3 Co. 12 - 6 Geo. 450 - 3 Pl.

The land of the debtor is first made liable, while
in his own hands: i.e. half of them to Exor for debt, by Stat^t of
Wes. 2 - 13. Ed. 3. by Elegit 3 Pl. 410 19-20 - 2 Bac 329 -
2 Pl. 475 - This Stat^t granted the writ of Elegit - The same
year the Stat^t of 13. Ed. 3. was passed enabling a debtor to lodge
all his lands by a Recognizance in the nature of a *vivum Radium*.

The persons of debtors were first made lia-
ble to Exor by the Stat^t of 25 Ed. 3. which gave a *Capias* &
satisfacendum 2 Bac 329 - 2 Pl. 475 -

Exors & admors are sued on in the con-
tract of the deceased, in detinue or in the Detinet & not in
the Debt, because they are liable in respect of the property

only which they hold for others & not in their own right & what they do not themselves own - But it has been holden that charging the Debit & Detinet is now cured by verdict under Stat. 13. or 16 & 17 of Car. 2. 2 Bac 443 - 5 Co. 159 - sid. 379.

So this rule then there is an exception when the Exor or Adm^r is personally liable, as he may be in certain cases as for Debt incurred when there is a lease for years after the death of the testator or intestate for he is charged in his own person. The deceased having never been indebted. 2 Bac 443. La Mo 297 - 1 Roll 603 - 6 Co. 61 - Cro. J. 411 - 546 - 225 - 1 Mod. 104.

So he is charged in the Debit & Detinet in case of a Devastavit, i.e. after Judgt^r agt^r him as Ex^r de bonis testatoris, for he shall not be charged with a Devastavit, or more surmise. 2 Bac 444 - 1 Sid 390 - 1 Roll 603 - 5 Co. 32 - 1 Ven. 315 - 21.

The Heir must be sued in the Debit & Detinet because he has assets in his own right & the debt descends with the land, charging him, however, in the detinet only is cured by verdict by virtue of the Stat^s 16 & 17 Car 2 - 3 Bac 29 - 5 Co. 36 - How 440 - Dyer 344 - 1 Lec. 130 - Cro. E. 712.

At C. L. the heir could defeat the Specialty creditor by aliening the land before action bro^t. But if he aliened after writ was purchased or Bill filed in Ch^o. the lands were liable in the hands of the purchaser: the Judgt^r having relation to the time of purchasing the writ or filing the Bill. 3 Bac 26 - Car. 245 - 1 Mod. 243 -

So a Judgt^r agt^r the heir binds the land by retrospect, it is otherwise in the case of Judgt^r agt^r the ancestors. But now by Stat. 3 & 4 M. & M. the heir in case of such alienation before action, is liable out of his own estate to the value of the land sold, yet the land sold is not liable in the hands of a bona fide purchaser, if the heir is alive.

363.

after action brd., it is a question whether the sale stands as
at C.L. 3 Bac 26- 1 Eq. cas. 149- 1 P.W. 777 Co. D. 102- Car. 245.
1. Mod 253.

Admrs.

It has been holden that the testator cannot bind the
Exor. when he is not bound himself. Thus c. covenant that
his Exor. shall pay L. \$1000- no action will lie agt. the Exor.
for this sum. 2 Bac 443- Cro. Cl. 232- Eq. 199- 2 Burr 1383- D.
Ray 403-6.

Formerly lands devised were not liable in the hands
of the devisee to be taken for Bond creditor, & hence they were
without any remedy, either at law or in Equity. 1 Eq. cas
149- 3 Bac 27- 2 Pl. 370- But now by Stat. 3 & 4. W. & A. devi-
ses of land are void as agt. bond creditor, who may sue both
heir & devisee in an action of debt & agt. them jointly.
can he sue the devisee unless the heir be joined? 3 Bac 27
- 1 Eq. cas 149- 325- Eq. 240- Law. cl. 399- 2 Atk 433- Paw.
Dec. 473- 2 Atk 125- 1 Paw. cl. 29.

A Devise for the payment of debt or for raising por-
tions for younger children is not within the meaning of that
Stat. Such Devises are good & a Bond creditor cannot defeat
them, he is paid only like the rest. 3 Bac 27- D- 1 P.W. 430- 3
Atk 630- 1 Pl. 776.

The heir of an heir is liable for bond debt of
the ancestor of the person to whom he inherited, But he is not
liable & apprehend in any case farther than the first heir
had assets & not so far, unless he has assets of equal amount
from the first. 3 Bac 20- 2 Cl. cas 175- Dyer 344- 1 Vern 400.

An Exor or a child of an heir, clearly is not liable
as such for the bond debt of the heir ancestor for the
heir himself is liable, and in respect to the bond to the land
his person, not being charged. But if the heir should alien
the land to defeat creditors equity will follow the money into the

... of the ...
 ... 2 ... 15 ... on ... The ...
 ... in ... the ... that ...
 ... where ... they may be ...
 ... 2 ... 1 ... 2 ...
 ... 2 ...

Who may be an Executor?

All persons whom man make will & many others may be Exrs. Persons of almost all descriptions may be Exrs. as a Villain - an infant in ventre sa mere, &c. Holt. 23 - 209 - Sav. 155 - 2 Bac 275-7 - Co. Litt 124^a - 2 Bac. 375 - Godol 103 - 1 Com. 2 Ch. 503.

If one appoint an infant in ventre sa mere & the Mother be delivered of two or more, they are all Exrs. 2 Bac 377 - Godol. 103 - Holt. 213.

But an infant cannot act untill he is 17 years of age & during that time an Exr. durante minoritate must be appointed Godol. 102 - 2 Bac 381 - Hob. 250 - Sav. 155 - 2 Bac 257 - 5 - Co. 29. or 291 - 1 Hob. 76.

Regularly the acts of an infant under 17 are not binding, thus he cannot sell testator's goods or assent to a legacy & when after the age of 17, he is not bound by his assent to pay legacies, unless he has assets to pay debts. 1 Ch. Cas 257 - 2 Bac 377 - Holt. 213-14-17 - Godol. 103 - Hob. 76 - 5 Co. 29.

An infant under 17 cannot sell the testator's house for years even to pay debts, but it has been holden that he may sell goods to pay debts or any other person by his order; this however is contrary to the general rule. 2 Bac 377 - Co. 254 - 1 Roll 730 - Sav. 155 - 2 Ch. 503. At the age of 17, or more he is bound by his acts as Exr. if done according to the Office & Duty of an Exr. as if he discharge a

Debt as paid. 1 Com. 499. Mod. 146 352. 5 Co. 27 Went. 15-16 Ex^{rs}.
309-10-2 Bac 377 Cro. 61. 490-

But an infant ex^r. is not bound by any act to his preju- Adm^r.
dice. As if he were to give an acquittance or release with-
out receiving payment. It would not bind him, & so if he de-
scends to a Legacy, when he has not assets to pay debts for in
these cases, if he were bound he would be subject to a Deven-
tment - So if he were to give a release for more than he
receives. It is not binding as to the Surplus - These acts
are not done according to his duty & office of ex^r. Went 205-1 Com. 249
- 2 Bac 370 Cro. 371. Co. Lit. 172-5 Co. 27-1 Roll 730-Mod. 146.

An Ex^r. can in no case commit a Deventment un-
til he is 17 & therefore if a Bond be forfeited & the Legat
ex^r. release it concerning the principal only, the release
is no bar to the action for the penalty 1 Com. 249-1 Vern 320.
2 Bac 370-1 Roll 730-1 Roll 76-a 46-7. An infant Ex^r.
tho' of the age of 17 cannot when sued appear himself, but by
Guardian like other infants, or the proceeding will be er-
roneous for he cannot make or appoint an Attorney
the reason of which is he has no remedy ag^t. the Atty for mis-
pleading or neglect, but ag^t. the Guardian he has a rem-
edy. 2 Bac 370-3 Ab. 150-a 155-1 Roll 207-Poph 130-Cro. 120.
-441-Palm. 229-1 Mod. 49.

But if an Infant Ex^r. sue by Atty & recover, and
it is not erroneous for he sues in auctoritate & the Judge
is for his benefit. 3 Bac 150-Cro. 441-Poph 130-Cro. 120.

If an Infant Ex^r. sue by Atty it is said to be void
or erroneous, tho' the Judge is for him. This distinction is probably
founded on the rule that an ex^r. cannot act until 21. But
can an Infant be an ex^r? 3 Bul. 100-1 Roll 200-Cro. 120.

If an Infant & an ex^r. are Ch^{rs}. they may both
sue by Atty, for the adult may make an Atty for the In-
fant. 1 Mod 47-72-296-2d May 1732-Cro. 1449 or 449-Str.
704-1 Vern. 102-a 112-3 Bac 117-Car 124-Cro. 370-1 Roll 200.

But if they are sued, the infant ^{Exor.} must appear by Guardian. 3 Bac 150-1. Stra 310-3. Mod 236. Stra 704. For an Infant deft. may be liable by mispleading to tort de bonis propriis, for which he has no remedy agt. the ^{Exor.} but he has agt. the Guardian. But an infant plf. is not liable even for tort. Stra 704-3 Bac 150-1-1 Roll 207.

A Feme-Covert may be an ^{Exor.} according to the spiritual Court, she is considered as a feme sole capable of suing & of being sued alone & of taking upon her the office of ^{Exor.} without the consent of her husband. 2 Bac 307. Went. 1202-81-91- Godol. 110-1 Com 235. But by the C.P. she cannot take upon herself the Office & Duty of ^{Exor.} without the consent of her husband. 2 Bac 117-370. Went. 203-

Therefore if the husband dissent she cannot act if the spiritual Court attempt to compel her to act, a writ of Prohibition will be issued. 2 Bac 370. Godol. 109-10. Went. 203. She cannot be compelled to take upon herself the Executrixship by the consent of her husband. Yet if the husband actually administers, she is bound by his acts during coverture - she cannot plead me unquam

So if the wife administers without the husband's consent & an action be brot. agt. them, she is stopped from pleading that she never was ^{Exor.} 2 Bac 370. Godol 110- If a feme sole is named ^{Exor.} & marries before she is intermeddled with the Executrixship & the husband administers this is such an acceptance as will bind her & she can never afterwards refuse it - This rule supposes the wife never to have dissented. Que. not after Coverture? 2 Bac. 370. Godol. 110.

A Feme Covert Executrix. it is said may make without her husband's consent a Will or rather a Testament of such goods as she has as ^{Exor.} 2 Bac. 370. Went. 190-9. Godol 110. But it is said on the contrary that the husband's consent either before or after is necessary to the va-

307.

Validity of the Will &c. vid 2 Bac 49 - 1 Roll 560 - 1 Mod 211-12. Ex^{rs}.

But it seems not to be disputed, that she as Ex^{rs} & 4. may make Donor of the goods which she holds as such & this seems much the same as making a testament, for the execution as such will have the disposition of the goods. 2 Bac 49 - Moor 420 - 2-92-1 Roll 600-912. Adm^{rs}.

The King may be Ex^{rs} by the English law, but he may nominate others to take upon themselves the execution of the trust & they may be sued as the representatives of the deceased 1 Com. 235. 2 Bac 374 - 4 Inst. 335 - Godd. 76.

A Corporation aggregate cannot be an Ex^{rs}. 1 Roll 915 - Contra. II. Because it is a body formed or framed for special purposes - and II^{ndly} It cannot take the oath to make the Probate of the Will. The latter reason is the substantial objection 1 St Ray 363-6 - 1 Com 235 - 2 Bac 375 - West. 17-25. Godd. 85 - According to the Civil & Canon Laws, & Apostates, Outlaws, Traitors, Felons & others cannot be Ex^{rs}. Godd. 85 - 2 Bac 375.

A sole Corporation may be an Ex^{rs} because it can take the oath. Godd. 85.

By the laws of England, no person is disabled from being Ex^{rs} by public offences ag^t the civil law. Thus Outlaws & persons attainted may be Ex^{rs} because they claim & may sue in "Quod dicitur" 2 Bac 375 - Co. Litt 120 - 1 Roll 914 - 1 Com 104. Yet they cannot make will of their goods because they are forfeited 2 Bl. 499 - Plac. 261.

Persons excommunicated cannot be Ex^{rs} for being excluded from the Church, they cannot dispose of the deceased's property in "Pious Uses". 2 Bac 375 - Co. Litt 134 - Godd. 85.

This (seems) is the only instance of the English law disqualifying "ex delicto". & in which may be an Ex^{rs} or a solvent, he may have the disposition of lands as well as moveables, as may because he holds in quod dicitur 1 Com. 235 - Bro. 89 - West. 17-22 - seems, by the civil law except in a military Testament which are governed by the "jus gentium". Godd. 86 - 1 Ven 417.

It is a question whether a lunatic, who is Idiot, can maintain an action as such. It seems to be conceded that he may hold assets & by the weight of authorities that he may sell or sue. 2 Bac 375-6- Co. 142-603- Moor 431- Skind. 370.

By the English law Idiot & lunatic are incapable of being Executors or Administrators for they cannot execute a Trust nor can they assent, or dissent to the trust 2 Bac 376 Godol. 36- ^{if a lunatic} ^{may} ^{becomes} ^{non compos} & Administration shall be granted to another. Salk. 36.

Prerogative Courts cannot refuse to grant Probate to an executor, because he is poor or insolvent for he derives his authority from the Testator 2 Bac 370-a-b- Salk. 34-299-lar. 450-7- D. Ray 361 1 P. W. 25-

Nor can the Prerogative, i.e. Spiritual Courts, demand or require caution, i.e. security since the testator received none. 2 Bac. 376- Car. 457- Salk. 36-299- D. Ray 361. But Chancery considering Executors as Trustees will compel them like all other trustees, to give security of Solvency. 2 Bac. 377- Car. 458- 1 Shaw. 290- 2 Vern. 249- Ch. cas 171.

So when the Exec. tho' not insolvent, is wasting the assets, Chancery will compel him to give security 2 Bac. 377- Ch. cas. 120-

So on suggestion of Insolvency in the Exec. Chancery will order debts of the deceased not to pay to the Exec. pendente lite 2 Bac. 377. 1 Ch. cas. 75.

What persons may be Administrators?

All persons not legally disqualified may be Admins. 1st Disqualification in want of age, no person can be an Admin. till 21 for before that age he cannot give

Ward to the ordinary which every e. schol. must do. 20.5. Mod.
395- 12 Mod 194- 501- 2 Bac 381- 3 Bb. 121- Pav. 5- Car. 446-
7- 2 Ray 330- 2 Lk 29- 5 Co. 29- Finch 39.

Exrs.

&

Adm^{rs}.

Right of admⁿ may devolve on an Infant as next
of kin but he cannot administrate until 21. 2 Bac 381- 5 Co.
29- It seems proper to say that an Infant cannot be an admⁿ.
till 21. then he is no infant- for no one can be e. schol. until
appointed by the ordinary. This is diff. from an Infant Exr.
under the age of 17- because he is named & 45. by the testa-
tor.

A feme covert may conceive by the consent
of her husband be an e. schol. for clearly she may be call-
ed as next of kin & I find no disqualification in them any
more than in the case of infant. 1 Com. 202- 49- 2 Bac. 413.

It is also inferable from a rule laid down by Judge
Reece, that a feme covert is postponed to others in equal
degree, it is also holden in some books, that she may be e. schol.
Reece's Relations 72- 1 Com. 249- 62.

If a feme sole Exr. marries the husband is liable
for her acts committed during coverture
even th a decedent. 1 Bac. 293- 1 Roll 351- Moor 761- Co. Lk.
200- 27- 458- 1 Sid 337-

It law the husband in the last case is bound to
receive coverture but in equity the creditor may follow the
assets into the hands of the husband after the death of the wife &
also into the hands of the Exr. of the husband. The question
there arises may not the legatee & next of kin pursue the asset in
Requits? 1 Bac 293- 1 Pre. Ch. cas. 50- 1 Vern 209- 2 Bb. 61 118

Corporations aggregate cannot be e. schol. - Becom-
municated persons cannot be neither, because they cannot
dispose of goods in "pious uses". 2 Bac 375- 8- Co. Lk 134-
Gaddol. 85

An e. schol. may be an e. schol. for he acts in au-
ter droit & therefore may sue. 2 Bac 269- or 762. Co. Lk. 128.

as, & therefore a Testator is in the case of an
 &c. for he is in the case of a Testator 2 Bac 375. Salk 14. Wren 134
 &c. in Testamentary may be Testamentary against Testamentary for the same
 reason. The same question arises to an Administrator as to
 one Administrator acting in the capacity of Testator 2 Bac 375. Salk 14
 110 B. 14. 111 B. 412. 413. 1100. 412. Salk 370.
Child & Donator cannot be a Testator Godol. 86.

Administration by Whom Granted.

Wherever the
 right of proving will in disposing of the goods of the deceased
 may have originally resided, the right of granting & admⁿ is now
 as granting & probate of wills now resides most clearly, except in
 certain cases, to the Ecclesiastical Court in England. It has been
 said, that the King is the Supreme Ordinance of the Kingdom,
 and as such may grant letters of admⁿ. But this right has
 since been denied. 2 & 3 Bac 390. 402. Ray 405 & 407. 1 Sid 354
 Salk 32. Holt 405 & 1 Bl. 494 5.

And a will cannot be given in evidence in a Court of
 law to prove title to personal property, until it has been found in
 the Ecclesiastical Court. Secus of a devise. Doug 631. Bos
 Decr 700. 8. Yet if a person dies intestate having no kindred
 the practice is for the King to grant letters patent & the Ordinance
 admit the Patentee to administer. The admission is said how-
 ever not to be de jure, but from courtesy or respect. 2 Bac 399
 Salk 27. Lev. 535. 115. 84. 3 Pl. 33. The Ordinary may in such
 cases dispose of the goods in "pious uses" for he is not obliged, &
 presume to appoint an admⁿ as in the case of a bastard
 intestate having no issue. The King according to usage is con-
 sidered to be the grantor of Holt 295 & 505. Salk 37. 3 Pl. 333.

In certain cases the Court Baron have by imme-
 morial custom a right to grant & admⁿ & prove wills
 but in no other way. 1 Bl. 406. 2 Bac 402. Salk 41.
 1 Ves. 35. 1 Amb. 25. 1 Bl. 156 677. 84 90.

311.

In Ct. the granting of admⁿ fall within the jurisdiction of the Court of Probate. & an admⁿ appointed in a neighboring State in which intestate dwelt may sue & recover his effects in this State. Kerb. 270. Locus in England 1 Ves. 35-6. Why is not Ct. Rule right? 3 P.W. 371. Wiff. 737.

Who are entitled to Administration?

By Stat.

31. Ed. 3. the Ordinary is bidden to grant admⁿ to the next & most lawful friend of the intestate & the words have been construed to mean the next of blood, who are under no disability. 1 Com 261. 2 Bl. 496-9 Co. 296.

Yet it has been always holden as it seems (Stat. 29 Geo. 2) that the Husband was entitled to admⁿ on the Wife's estate under this St. 1 Com 261. 2 Bac 414-4 Co. 51. 1 Roll 910. 16-17. 2. Quere: Was the Wife entitled to admⁿ on husband's estate? It does appear that she was according to one case - Ray 490 2 Bac 414-16 - to the exclusion of the Husband's kindred.

If there were several next friends, i.e. friends in equal degree the Ordinary might perhaps select the most fit of them. Ray 493. 2 Bl. 496-9.

Next friend & next of kin seem to be considered as synonymous, except that the husband & widow are included in the first word 2 Bac 414 - Prov. 2 - 1 Com 261. This seems to have been considered in some measure as explanatory of the St. 31 Ed. 3. that gave the power of preferring the next of kin to the wife or of joining them. Both Stat. together are now the basis of the law on this subject. Stat. 2 Hen. 8. Prov. 2.

This St. does not seem to give the admⁿ to the husband on the wife's death, but it has always been holden that he is entitled to it Prov. 2 - 1 P.W. 381. 2 Bl. 496-504 - 1 Ven 219. Still the admⁿ are not bidden to distribute to the kindred of the deceased. tho' there has been some controversy on this point 2 Bl.

515- & Co. 135- Godol. 252-4- 1 Leo. 233- 2 W. 447. But now by
 St. Distributions, 22 & 23. Car. 2. & Adm^rs. are obliged to
 distribute, yet husbands & Adm^rs. of wife's are excluded by St.
 29. Car. 2. not to be within St. of distributions of 22 & 23. Car. 2.
 2 Bl. 515. Hence if the Husband die before & Adm^r granted or
 taken his representative in his last will or & Adm^r will be entitled
 to administer on the wife's estate to the exclusion of the next
 of kin in equity & the Ordinary is said by Sancroft & the com-
 pellable to grant it. Do. 2-3 2 Bl. 508 3. Atk. 516 1 W. 381-2.
 The Husband is even called next of kin in some cases. 1 W. 381.

If the wife being & Adm^r to another die, the & Adm^r of
 the goods which she left as & Adm^r goe not to her husband but to
 the next of kin to her testator. Do. 2-3- Setk. 21.

By Stat. 31. Ed. 3. & 21 Hen. 8. the Ordinary is compella-
 ble to grant the & Adm^r of the husband's effects to the widow
 or next of kin, but he may grant it to either or both 2 Bl. 496.
 Setk. 16. Do. 3- Sta. 552- 1 Com. 261- Ray. 43- 1 Shaw 357- 1 Vern 315-

When the intestate has no wife & Adm^r goes to the
 next of kin, among kindred those of the next degree are pre-
 ferred. But of those in equal degree, the ordinary may take
 which he pleases. Do. 4- 2 Bl. 496- 504- Ray 498- Setk. 38- 1
 Com. 261- This is a general rule to which there are some excep-
 tions. See "subter."

An & Adm^r when granted to two or more may always be
 joint & in some cases several. Several Administrations may
 be granted of several parts of the goods, to the wife & to next
 of kin - as children, brother, parents &c. Do. 4- 10 Mod 900- Shaw
 357.

But an entire thing as of a Bond of £100- &c. several
 administrations cannot be granted. If two are appointed
 they must be jointly appointed. Do. 4. Setk. 36- 1 Sid 100-

The degrees of kindred are computed according to
 the Civil Law & not according to the Common Law; therefore chil-
 dren are preferred to parents for according to the Civil Law com-

putation is from the deceased as. I do not descend, Exors.
among claimants but among children, in equal degree it des-
cends in default of children. 2 Bac 415- 2 Bl. 504- Dac. 406. Admrs.
Gadol. 253- 2 Vern 125.

The Order is this 1st Children: 2nd Parents: 3rd Brothers:
4th Grandfathers. 30 Att 762- 1 Bl. 453- 1 Pre. Ch. 527-
1 P. 16. 41- 2 Bl. 505. Females are entitled equally with males in equal
degree 2 Bl. 504-5- Dac. 4. In computing degrees proximity not
quantity of blood of blood is regarded. Therefore half bloods are equal
to or with the whole. 2 Bl. 505 1 Ven 316 23 or 32 425. Stra 74.

Do the claims of "next of kin" or next friend, as Son
& daughter: brother & sister extend to their representatives? So
that representatives as such exclude more distant kin than their
parent? The Att. do not mention next of kin nor do the Books
generally; but it seems according to an authority that under
the Stat. 31. Ed. 3. the right of representatives do not obtain, as
in Stat. of Distribution. Ray 490- 2 Bac. 414- or

The Order under the 31. Ed. 3. is said to have been
Ist Husband & Wife: IInd Children & their representatives: IIIrd
Parents: IVth Brothers & Sisters & their representatives. but
these as to the representatives. Ray 490.

Some of the characters just mentioned as husbands
wife if they will not accept by a custom in England &c.
they may be admitted as next of kin. 2 Bl. 505
Attk. If there should be neither husband or wife or next of kin
the King according to usage appoints or rather recommends
to the ordinary & the court of course. 1 Attk. 37- Dac. 5- 34-

If an executor refuses to act or dies intestate leaving
goods unadministered upon an estate must be granted.
But in this case the Stat. 31. Ed. 3. 21. Hen. 8. do not con-
trol the ordinary, he may appoint whomsoever he pleases.
1 Hen. 219- 1 Ed. 201- 2 Bac 306- 2 Bl. 505.

He may grant a license to the residuary legatee
in exclusion of the next of kin on the presumption that

the deceased meant to prefer him. But such a presumption does not exist for the residuum is given to another. The Stat. 21 Hen. 6. requires it to be given to the next of kin. But may the ordinary appoint any other than the residue or legatee, unless he be disqualified? This is a doubtful point. It seems for the reason just given, tho' it is said sometimes he may. 2 Stra 556-558.

If a testator died intestate as to part, i.e. no residue or legatee being appointed, the next of kin in presence would be appointed or entitled, for as to this part, the case differs not from the common cases of intestacy. 2 Bac. 306-307. Dyer. 272. Shaw. 25. Godol. 230.

If a residuary legatee entitled to a *dominus* dies, his next of kin & not the testator must have the *dominus*. Tho' Godolphin speaks only of an *exor* who is an universal or residuary legatee. Godol. 230. If there are none of these persons, the ordinary may appoint such persons as he pleases as he might have done previous to the Stat. 31 Ed. 3. 2 Bac. 303. Ray 497-2 Bl. 505. How. 270. Doo. 5. The person thus appointed may now it seems be a proper *exor*, tho' before the Stat. 31 Ed. 3. he was merely a servant or *attor* to the *Ordinarius*. Or in this case the Ordinary may grant letters to such persons "*ad colligendum bona defuncti*" tho' not to make him an *exor*. But a kind of *bailee* or *trustee* & keep safely the goods & do some other act. Doo. 5. 2 Bl. 515. Hen. 14.

When an *exor* durante minore aetate is appointed, the Ordinary is not bound by the Stat. on this subject, for he is but a Curator for the infant & has no interest or benefit but in right of the infant. He therefore is not bound to appoint the next of kin to the testator or infant. 2 Bac. 304. Doo. 5. Hob. 257. Mod 244. Granting *exor* in England to the husband is not within the words of the Stat. 21 Hen. 6. 1 Hen. 123. yet under this Stat. Nuclearies are appointed.

If a person named *exor* does not appear before the ordinary on being summoned to accept or refuse he is excom.

municated 2 Bac 403-5- Godol. 140- 2 Shaw. 253- Went. 36

Cars.

Adm^{rs}

Of Transmitting the Trust of Executors

If an Adm^r dies his Cars are not e Adm^{rs} to the intestate. e Adm^{rs} must be appointed anew. Sac. v. Went. 14- 9 Bac 385-6- De honis non R. B. 85- 2 Bl. 506. The e Adm^r cannot transmit the Trust reposed in him to another because he has no interest except what he derives from the Ordinary: the Trust results to the Ordinary. Swinb. 346- or 396- 1 Roll 907- Godol. 230- 1 Com. 251.

So if the e Adm^r dies, his e Adm^r is not e Adm^r to the first intestate for there is no priority between them. 2 Bl. 506. e Adm^{rs} have no e Adm^r unless one is appointed on his estate. Hence the second e Adm^r is appointed to administer the effects of the first only & not of the e Adm^r. Therefore it is necessary for the ordinary to commit e Adm^r afresh of the good of the deceased, not administered by the former e Adm^r.

But the Ex^r of e Adm^r: The latter having first proved the Will is Ex^r of e Adm^r for the power of all e Adm^r is gained by the appointment of the deceased & the appointment is made on a full confidence in the Ex^r. He may therefore transmit to any one, in whom he has equal confidence, i.e. after he has proved the Will. 1 Com 251- 1 Roll 460- Pre. Ch. 173- 1 Sco. 275- 1 Roll 907- 2 Bl. 506- If John Hiles dies having two creditors A & B. & e Adm^r leaving C. his Ex^r: - C is not Ex^r of e Adm^r estate during A's life. The whole authority survived to B. but if after A's death B dies leaving C. his Ex^r: - C is the Ex^r for e Adm^r. 2 Bac 405- 1 Roll 311- 1 Bl. 127- 1 Com. 251- 2 Bl. 506.

If the e Adm^r of e Adm^r Ex^r is not the representative of e Adm^r for the e Adm^r in this case has no relation to e Adm^r: there being no priority between them. 1 Com. 251-

The e Adm^r is commissioned to administer the good of e Adm^r & e Adm^r & not those of e Adm^r the original testator 1 Roll 907- 2 Bl. 506- Godol 230- 5 Co. 29- b. An e Adm^r de honis non cum

Testaments must be granted. 2 Bac 301 - 1 Roll 907.

If before Probate & V. S. Exr. dies leaving good Exr. the latter is not a S. Exr. 1 Roll 907. 2 Bac 306. 1 Salk 301. 1 G. 2. 372. So if I. leave A. his Exr. & A. die leaving B. an infant & V. S. Exr. & A. die. Successive admin. as to the goods being granted to C. C. is not the representative of I. 3. 2 Bac 381. 1 Cr. 211. 1 Rob. 246.

Whenever therefore the course of representatives from Exr. to Exr. is interrupted by any one admin. & the goods are not administered, Admin. must be granted of the goods not administered by the first Exr. or admin. 1 Roll 900 - 2 Bl. 506.

Admin. de bonis non, like an original Admin. may be special, i.e. of certain specific parts of the whole effects not administered upon - the remainder being committed to them. 1 Roll 900 - 1 Salk 36. 2 Bl. 506.

The Manner of Proving Wills.

The Ordinary may at the instance of any person interested cite the Exr. & prove the Will. 2 Bac 403. Godol. 16. or 60. According to some opinions the Exr. may be cited at the instance of any one, that he may know whether he has a legacy left him & the Ordinary may sequestrate the testator's goods till the will be proved. 2 Bac 493. Godol. 63.

If it be uncertain whether the testator is dead or alive, & if the testator be in distant parts & the common fame is, that he is dead - The facts are to be judged of by the Ordinary whether there is good presumptive evidence of his death & admit the will & he provided. 2 or 3. 1 Roll 129. 30. But if the testator be alive, the Probate is *hab. initio* - the Ordinary having no jurisdiction.

Care
and
Admrs

The time in which the Will ought to be proved, is not settled by any precise Rule. It is left to the discretion of the ordinary. But the existence of the Will ought to be made known within four months from the time of the testator's death to the proper Officer. 2 Bac 403 - Godol. 61-2.

There are two modes of proving wills. Ist In common form as when the testator presents the Will without citing the parties interested & deposits himself that it is the true & last Will of the Testator, & the Judge upon this proves it. 2 Bac 403-7 Godol. 62. IInd In form of Law, i.e., when next of kin and Widows are cited to be present when witnesses are examined,

When an executor proves a will in common form, he may be compelled to prove it again in form of law, but otherwise when the Probate is in form of law first Godol. 62. Phil. 290. 2 Binney 511.

The Probate of a will in common form may be questioned at any time within 30 years. Secus, if in form of law. 2 Bac. Phil. 290. 403 - Godol. 62. By Stat. 8th Geo. 3. an appeal lies from probate to Ch. in any time within 60 days. Stat. 8th Geo. 3. 202.

Executors Regisill.

The office of

Exec. being Private the being named by the testator not appointing him, he may refuse to accept of the Executorship, in the first instance & then an adm^r cum testamento annexo must be granted. 2 Bac 403-5 - Shaw 252 - Went. 36 - Godol. 140.

But it is said that the ordinary may compel the testator to prove the will & make his election to accept or refuse, tho' he cannot compel him to accept Godol. 61 - 2 Shaw 352 - 2 Bac 405.

But the Court cannot assign his office, it being discretionary, nor can he refuse by any act in pais, as by declaration that he will not accept, i.e., this alone will not bind him. It must be by some act recorded in the Spiritual Courts.

In a case *Lawrence* (in *Wid. 2*) when the Ex^r refused the words were merely that he did not wish to accept & yet that renunciation was holden binding. *Chol. 92* 2 *Bac* 405 *Went* 37.

If there be but one Ex^r named & he refuse & then a sum testamentary annex must be granted, & the Ex^r can never after prove the Will or act as Ex^r. 2 *Bac* 405. *Vaughan* 1114. 1 *Moll* 907 *Max* 251. Quere may he not have himself put up to prove the Will before a Ref^r granted?

Yet if one of two Co-Ex^{rs} sworn before the Ordinary and the other prove the Will, the first may administer anytime afterwards & after the death of his Co-Ex^r, for the Executorship survives & he is preferred to all the Ex^{rs} of his Co-Ex^r for as the Will has been proved the Ordinary has no authority to take the refusal during the life of him who proved the Will, tho' he may afterwards since Probate by one Ex^r & it binds them all to act. *Salk* 313 11- 2 *Bac* 405- *Mud* 373- *Dyer* 161- *Hard* 111- 7 *Mud* 37- 5 *Co* 20- 9 *Co* 3. *Co* 511. 292- *Salk* 307- 3 *W* 251.

But according to the civil law the renunciation is permanent & continuous. *Salk* 311 3 *W* 251 5 *Co* 20 9 *Co* 37. So the Ex^r refusing in the last case, may release debt due the Testator. *Co* 511. 29- *Salk* 307- 4 *W* 365- 2 *Bac* 384- 96- 9 *Co* 37 *Co* 511. 292. a & b.

So the Ex^r refusing must be named in every action brought by the others. 9 *Co* 37. a- *Salk* 307- 4 *W* 365- 2 *Bac* 381- 396- See also when the action is brought against the Ex^r. 2 *Bac* 396- Because the plf. is not supposed to know that any other persons are Ex^{rs} than those who act as such.

After an Ex^r has administered he cannot afterwards renounce, for by that act he accepts of the Executorship which determines his election & makes him liable to suits. 2 *Bac* 405 *Godol* 111. 2 *Jones* 72- 2 *Mud* 110. a & b- 1 *Went* 203- *Wentworth* 38- 2 *Bac* 102- 1 *Moll* 907.

It is a good Rule that whatever the Exr. does with respect to the effects of the testator which shews an intention to accept the office, amounts to an administering so that he cannot afterwards renounce. So also any act which would make an Exr. de son Droit is an Adminⁿ & is deemed an election of Executorship. 1 Ven 335. 2 Wils 38. 2 Leo 102. 2 Bac 406. 1 Roll 917. Exr.^s taking possession of testator's goods & converting them to his own use is an election. 2 Ger 166. 1 Roll 907. Went. 39. 2 Bac 406.

So taking the goods of a Stranger & administering them under an apprehension that they are the testator's amounts to the same thing. Yet it would not bind him, if he should take the Debtor's rule as the debt of testator. 2 B. & C. 11. 11 Mod 14. So if there are ten Exrs. & one of them takes possⁿ without the consent of any of the others of a specific article bequeathed him by the testator this is an Adminⁿ for a legatee cannot take his Legacy without the consent of the Exrs. 2 Bac 406. 1 Roll 917. But if the Judge knowing he had administered, will receive his refusal notwithstanding & grant Adminⁿ to another the grant is good & the Exr. can never after resume his Office. 2 Bac 405. 1 Roll 917. Went. 401. Yet if after Adminⁿ only because Exr. did not appear on summons to prove the Will, if Exr. chooses to accept, he may & Adminⁿ be repealed. 2 Bac 405. Went 401. And if after the Exr. has refused & Adminⁿ granted to another, it appears to the Judge that the Exr. had administered before refusal (scilicet the Judge may respect the Adminⁿ & compel the Exr. to administer) 2 B. & C. 11.

If the Exr. appears & take the usual oath that he will justly execute his Office, he cannot afterwards renounce it, for he has by the oath accepted. nor can the ordinary refuse to admit him, even tho' after taking the oath he had refused, for if he does this a Mandamus lies. 2 King 363. 463. 2 Bac 405. 1 Ven 335.

319.
Exrs.
&
Adminⁿ.

The manner of granting Administration.

In what cases it is granted including the different kinds of Administration.

Administration must be granted by writing under Seal and by parcel. 1 Com. 263. 292 294.

It is to be granted II^o When one dies intestate: hence the person entitled by law to Adminⁿ has a general authority to act for himself, & not for another who has a superior right 1 Com 265-58. 292 294. 9 Co. 39. Stat. 31 Ed. 3. 2 Sta 1137.

The Ordinary may take hands of the Adminⁿ for due Adminⁿ in all cases, even where it is cum testamento annexo 1 Com 263. 2 Sta 1137.

It may be granted jointly to two or more & if one die the Office survives; this therefore is diff^r from the common cases of delegated authority, as a power of Attorney to two, when one dies, the authority ceases. 2 Bac 416. 2 Com 240. 2 Vern 214. 1 Ld Ray 462.

But Adminⁿ is rather an Office; several Adminⁿ may be granted for distinct things, but not of an entire thing as a Bond \$1000. Ld Ray 36. Godol. 70. 1 Com 263. 1 Roll 900. 1 Sid. 101. Went. 12. 2 Bac 406. 394.

If a person be made Admⁿ without any limitations or restrictions, he cannot renounce as to a part, thus he cannot waive a term tho' of less value than the Debt; he must renounce in toto if at all. The same rule obtains in Admⁿ granted generally (semb.) 2 Bac. 394. Ld Ray 377. 4 Ld Ray 183.

III^o It was formerly doubted whether Adminⁿ could be granted to one during the absence of the testator, an Outlaw, or in prison, or out of the realm, but it is settled there may be. 6 Ld Ray 304. 4 Ld Ray 415. 1 Com 263. Ld Ray 47. 2 Ld Ray 192. 2 Bac 415. 375. 2 Ray 1071. 1 Roll 906. 8. 10. 3 Ld Ray 23. 5 Ld Ray 128.

III.^d So when the rightful Adm^r. is out of the realm, in prison or an Outlaw a temporary Adm^r. may be appointed. But why should it be granted in case of Outlawry, when an Outlaw may sue as Clerk & Adm^r.? This kind of Adm^r. however ceases where there is absence, imprisonment or of banishment. Co. Litt 120-2 Bac 375 - & it Outlawry.

Exce

4

Adm^r

IV.th It may be granted "pendente lite" of a will to cease when it is decided. Yet Olin doubted whether Adm^r. could be granted in this case. 1 Com 263 1 Stra. 917 2 Shaw 69 - 2 W. 56 - or 576 2 Bac 415 - Dow 192 - Moore 606 - Car 153 -

V.th So if there be a dispute about the right of Adm^r. it may be granted "pendente lite" 1 Com. 243 - Plow 297 - Car. 153 - These temporary Adm^r. are capable of suing & being sued while their authority continues. Ab. Auth. Sta 917 - 2 Ray 1671 2 Bac 415

VI.th If the Ex^r. named refuses an Adm^r. cum testamento annexo must be granted & an Adm^r. de bonis non for none of the goods are administered upon. 2 Bac 386 - Or such of the goods as are not administered upon. 9 Co. 37^a. 40^a - 2 Atk 304 - 5 - 1 Com 253 - Plow 286 99^a 1 Roll 907^a 915 935.

VII.th If the Ex^r. dies before Probate, an Adm^r. cum testamento annexo must be granted & not "de bonis non" 2 Bac 386 - 2 Atk 304 5.

VIII.th If the Ex^r. has actually administered before Probate, an immediate Adm^r. is granted cum & because he died before he undertook the execution of the will. 2 Bac 386 - 2 Atk 304 - 5 - 1 Roll 907.

IX.th So if a person makes a will & names no Ex^r. an Adm^r. cum testamento annexo must be granted immediately, but if an Adm^r. dies leaving goods unadministered, Adm^r. de bonis non, must be granted 2 Bac 385 - 2 W. 506 1 Roll 907.

X.th So if Ex^r. dies intestate after proving the will Adm^r. "de bonis non" cum testamento must be granted for then

The testator has administered in part 2 Wac 386 Salk 304 5. In this case the testator is said to die intestate 1 Roll 907. Admⁿ de bonis non include all personal property of the deceased which remains unadministered, household goods. 2 Wac 386 Salk 306. Skind. 143. So money rec^d. by the original testator, kept by itself for it can be identified. 1 Salk 306. So debt due original testator, but if the original testator takes a note for debt due testator

the acceptance of the note is such an alienation of the property, that the note vests in the representative of the original Admⁿ or testator a note in the Admⁿ de bonis non 2 Wac 386. 1 Vern 473. 2 Bu 362. 1 Olde 300^a Salk 306. Skind 43. 243.

By an old rule of law if the original testator or Admⁿ had brought an action recovered judgment, died without taking execution; an Admⁿ de bonis non, could not sue out in execution, or in any way take advantage of the judgment, by not being privy to it. 2 Wac 386. 4olo. 33 83. Datch 140. Sid 29. Mod 290. Salk 322 3. 2 Ray 1072.

But now by Stat^u 17. Car. 2. fac. 2. The Admⁿ de bonis non may have a Writ Facias on the judgment when it is rendered on a verdict. 2 Wac 386. 7. 1 Mod 291. Salk 322 3. 2 Ray 1072.

XI. If the testator be under the age of 17 an Admⁿ durante minore aetate must be granted. Godol. 102. 1 Com 252. 8. 5 Co. 29. 2 Wac. 200. Sav. 1973. Went. 307. 2 Mod 26. So if the person entitled be an Infant, an Admⁿ durante must be granted till he obtains full age. 2 Wac 381. 1 Com 252 8 62 Skind. 155. 5. Mod 395 Salk. 39. Sav. 193. Com. Ob. 159.

An Admⁿ durante is as in the last case being but a Curator of the Infant, the Ordinary may appoint whomsoever he pleases. 2 Wac 381 Skind. 155. Ab. 250.

It is laid down in 5 Co. 29^b that an Admⁿ durante granted during the minority of an Infant testator under 17 determining on her marrying a person of full age, as he becomes interested with her right as testator. It is of age to act but this is denied by some authorities. 3 Plu. 79. 1 Com. 250.

If an Infant and an Adult are *Test.* & *Adm.* *durante min.* is not granted to a third person for the Adult being of full age may execute the will, & *Adm.* to a third person is valid. *Spoc. 193.* But it is said that the *Exr.* of full age may take the *Adm.* *durante min.* I declare as such. *2 Bac 381. The Ch. 46- 2 Geo. 239 40-*

So if two Infants are *Test.* & one of them of the age of 17 & the other under the former may execute the will & *Adm.* *durante min.* is not granted. In this case I think the older cannot take the *Adm.* *durante min.* for no person but an Adult can be an *Adm.* *Geo. 193.*

If *Ad.* die leaving A. his *Exr.* & A dies leaving B. an infant his *Exr.* & C. is appointed *Adm.* *durante min.* of B. C. is not the Representative of A. tho he acts for B. who is A. *Ad.* *Exr.* - but an *Adm.* *durante min.* of B. must be appointed. *2 Bac 381. Cro. El. 22. Godol. 230.*

The Authority of an *Adm.* "durante min. actale," of An Infant *Exr.* or *Adm.*

It is said above in 1 Com 250 (who however cites in authority to the point) that the *Adm.* "dur. min." is one entitled to *Adm.* for the time & has all the power of an absolute *Adm.* 1 Coll. 110. 1 Com. 250.

But it seems established that an *Adm.* "durante min." has not such a general property in the effects of the deceased or such authority as an absolute *Adm.* has, for his authority is "generally given him" *ad commodum et periculum executoris*, so that he is in the nature of a Bailee to the Infant *Exr.* or *Adm.* *2 Bac 381. 5 Co. 296. Cro. El. 1 Com 250- 2 Leon. 103-*

These authorities relate to the case of an *Adm.* "dur. min." of an Infant *Exr.* only, but his power & presence is the same as that of an *Adm.* "dur. min." of an Infant entitled to *Adm.*

The authority of an *Adm.* is generally granted "pro bono

at *commodo executoris*" but not always, yet the authority is such that he may do all acts, which are incumbent on an Exr. & which by legal presumption for the advantage of the Infant & of the estate of the deceased; Thus he may assent to a Legacy when the assets are suff. to pay all Debts, but not otherwise. 2 Bac 381. 5 Co. 24.

An Exr. may assent under any circumstances tho at his peril. 2 Bac 381. 1 Com. 250. So he may sue & be sued. 2 Bac 436. 3 H. 487. 6 Co. 67. 6 D. 6. 719. 6 Co. 67.

But as he cannot do any thing to the prejudice of the Infant, he cannot sell the goods of the deceased except for the payment of debts, which is a case of necessity; or unless they are perishable, in which case, he may as bailiff, sell. 3 Leo. 103. 1 Com. 250. 2 Bac 381.

He cannot make a Lease of a term vested in the Exr. or Admr. 2 Bac 381. 1 Com. 250. 5 Co. 24. 6 Co. 67. There is an exception to this Rule, when the Admr. "de iure" is appointed, generally, i.e. not "ad commodum" & here a term may be vested in the Exr. & it is good till the Exr. obtains the age of 17. 2 Bac 381. 2. 6 Co. 67. But it is now laid down, that the Admr. in this case may not sell the goods of the deceased, except for the payment of debts &c.

When Administration may be Repealed,

It was holden formerly in some decisions, that the Ordinary could not repeal Letters of Admr. once granted, he having executed his power. 1 Com. 263. 1 Sid 173. 2 Keb 603. 6 D. 6. 45. Ray 93. 2 Bac 410.

But it is now clearly settled that Admr. may be repealed for various causes. 1st when unduly obtained. This happens 1st if Admr. be granted on the supposed ground of intestacy when in fact there is a will which is valid; here on Probate of the will, the Admr. must be repealed. 2 Bac 400. Lev. 18-19. 2 Atk 67. 1 Roll 907. Powell 47. 1 Com 262.

2.nd When in case of actual intestacy (unduly obtained) Exms
 Exm. Admⁿ is granted to one not legally entitled to it, as to next of
 kin, or some covert excluding her husband. Here it must be
 repealed in favour of the husband. So if granted to a stranger if there are kin-
 dred not disqualified, & so if granted to next of kin "cum testamen-
 to annexo" when there is a residuary legatee. Bar. 10. 19-3 Sid 22-
 1 Com 263- Lev. 36- 1 Ven 120- 1 Salk 38- 1 Sid 409- 4 Barns & L. 236.

3.rd When obtained by false suggestions or any kind
 of fraud it may be reheated. 1 Sid 193- 370- 2 Keb. 63- 70- 2 Bac 410.
 So if obtained by surprise in the Ordinary, as if granted Admⁿ
 on a wrong suggestion, then probably not fraudulent. Stra 911-
 Lev. 19-

4.th So if obtained in any irregular manner as with-
 out citing the parties required by law. 1 Com. 263- 1 Lev. 305-
 Barns Cl. L. 236- So if obtained without giving security to
 account, or if taken within 14 days, or according to Keble 15.
 2 Bac 410- 2 Keb 664.

So if after Admⁿ is granted a new Admⁿ is obtain-
 ed by fraud, without a repeal of the first & the first Admⁿ releases his
 Admⁿ - The second must be repealed & the release is void. 1 Com.
 264- 6 Co. 190. Dr. 339

5.th Admⁿ duly obtained in consequence of matter "ex
 post facto", as if the original Admⁿ should become a Lunatic
 or otherwise incapable of administering 1 Keb 846, or 864. 1
 Com. 263- 1 Lev. 158- 1 Sid 273

So if the person legally entitled, be incapable at the time
 of the Testator's death & Admⁿ be granted to another; this Ad-
 ministration may be repealed on the former becoming
 capable. Bar. 10. 19- 4 Barns & L. 236- 79- 1 Sid 271 3- 6 Co. 1160

Admⁿ it is said may be repealed without a sen-
 tence of revocation as by granting a new Admⁿ which of
 itself repeals the former. Lev. 19 & St. aut.

The Consequence of Repealing Letters of Administration.

It is a general rule that when the only objection to an Admin^r is, that it is granted to a wrong doer or person the grant is voidable & not void & if it is afterwards repeated on citation by the Ordinary all the intermediate lawful acts of the first Admin^r are good; as if he gave the goods of the intestate to another for that is a lawful act, i.e. such as a rightful Admin^r may do. 1 Com. 264 - Cro. E. 460 - Dow. 50 - 6 Co. 60 a - Moor 396.

In this case if the first Admin^r were a creditor to the intestate he may retain like any other rightful Admin^r to satisfy his debt. 2 M. 38. 2 D. Ray. 604 - Com. R. 96 - 2 Bac 412-10

But if an Admin^r whose letters are repeated by citation make a gift of the intestate's goods by Co. in, before the repeal, the gift is void as against a creditor by Stat. 13. Edw. 2. the goods against the second Admin^r. 6 Co. 10 b. Dow. 50. Yet if the first Admin^r be set aside on an appeal to a higher ecclesiastical Court or jurisdiction, the intermediate acts of the first Admin^r, i.e. between the appeal taken & the repeal, I suppose are void. 3 T. 128.

A Repeal on citation is only a repeal of the former Letters of Admin^r & does not affect the original sentence - but a Counter sentence upon appeal acts directly on the sentence appealed from, which is suspended by the appeal itself, & after the repeal it is considered as if it never existed 6 Co. 18 - Dow. 50 - 1 Com. 264 - Cro. E. 460 - 3 Keb. 206-7 - 3 M. 129 - Raym. 114 - 2 D. w. 90

Note these cases in 6 Co. 10 & Ray 294 - were where the appeal was after an affirmance on citation.

And if the first Admin^r in the last case has obtained a Judgment against a debtor of the deceased before the repeal, the debt may be retained against by an "audita Querele". 1 Com 262-4.

1 Bac 378 - 2 Lau. 149 - 1 Moor 62 - 2 Bac 412 - 2 Keb. 668 - 10 Mod 212 ³²⁷ *Lars*

So if the debtor be taken in Exon on this Pledgt. he may be discharged on motion. 2 Bac 412 - 4elv. 83 Brownlow 91. *Adm^{rs}*

Adm^{rs} granted by a wrong authority, as by a Bishop of a Diocese is void. 2 Lk. 30.

Agreeable to the Rule that a repeal on citation does not make void all intermediate acts, it has been holden that if a person died intestate & a will is forged & proved as his will, & this Probate is afterwards revoked on citation, & *Adm^{rs}* granted, all lawful acts, as such as a rightful Ex^r might do, remain good: Thus a creditor who paid a debt to the supposed Ex^r is not obliged to pay the same debt again to the rightful *Adm^{rs}*. 3 T. R. 125.

But the Rule does not hold or apply that after a repeal on citation, that all lawful acts remain good when the deceased left a valid will, but to cases of actual intestacy only. 1 Com 204 - 2 Bac 411.

If the deceased left an Ex^r & the Ordinary not knowing of the fact granted *Adm^{rs}*, & the Ex^r afterwards proves the will he may avoid all lawful acts done by the *Adm^{rs}* because the Ex^r had an interest of which the Ordinary could not deprive him. The Ordinary has no authority to grant *Adm^{rs}* except early, when a person dies intestate & this *Adm^{rs}* is void. 2 Bac. 411 - 1 Shaw. 411 - 1 Com. 238 - 64 - Plow. 277 - 80 - 2 Co. v. 103 - 150 - 2 Jones 72 - 1 Ven. 303.

Mr Justice Buller seems thoroughly & shortly to disapprove of this rule. If the Ecclesiastical Courts say he have jurisdiction their sentence as long as it stand unrepealed shall avail in all other places & when they have unquestionable jurisdiction. 3 T. R. 430 - 1 - Co. v. 47 - 177 - Swinb. 300 - 2 Lk. 27 - 2 D. Ray 1910.

So if the Ex^r deceased left two Wills, which the former was revoked by the latter & the Ex^r of the first proved. Yet on the Probate of the second by the rightful Ex^r, all the mesne acts of the first Ex^r are void. Buller & Gray Judges dissenting the Rule. Quere: Was not the two last cases, cases of inter

What Acts an Exor. may do before Probate.

Exor.

Solm.

As the Exor. derives all his authority from the will the Property of the Testator's effects is vested in him before Probate at the death of the Testator.

Proving the will is called a necessary ceremony 2 Bac. 412 - It is properly unnecessary evidence of its existence & of the Exor's rights 2 Bl. 507 - 1 Atk 460 - 1 Com. 238 - Went. 33 - 1 Holt 917 - Co. Lide 292 - How 200 - Dav. 173 - Godol. 144 - Hence the plea, that the Exor. who sues as Exor. has not proved the will, is bad; it should be that he is not Exor. & then it would be necessary for the plf. to produce the Probate. Nutt. 31 - 2 Bac 396 - Salk. 3 - 106.

This evidence of the Exor's right, viz; Probate is necessary because it is said in the Probate, there is an Inventor exhibited, & other acts to be done, which are for the benefit of creditors & Legatees 2 Bac 412 - Salk. 303 - Nutt. 30 - As the Exor. therefore derives his right from the will he may before Probate do many acts which will be valid. 1 Com. 238 - 2 Bac. 412 - 13 - Went. 33 - Godol. 144 -

But an Exor. can do no valid act till Solm. is granted. And for he derives his whole authority from his appointment by the Ordinary. By valid acts are meant acts affecting the estate or the right of claimants & their indifferent acts are those which any person may do. 2 Bac 412 - Dav. 2 - 173 - Skit 87 - Salk 363 - 2 Bl. 505.

The Exor. may take possession of the testator's goods & may enter the heirs house (if he can without breaking) to take securities belonging to the Testator before Probate. 2 And. 271 - 2 Bac 412 - Dav. 173 - Godol. 144 - How 277 - Went. 33 - But he may not break main door, nor even a chest for that purpose. Dav. 175.

So before Probate he may assent to a Legacy & the assent is binding & vests the interest in the Legatee. Co. Lide. 292 - Godol. 144 - Fre. Ch. 441 - 2 Bac 413 - Went. 34. 49 - 2 Bl. 507. n. 10.

So he may pay & receive debts & Legacies given and

take release. Gov. 174 - 5 Co. 286 - 1 Com. 238. Hutt. 31 - How 281 & 279 Co. 394 - Co. Litt. 292.

But if one entitled to ~~the~~ ^{the} ~~debt~~ ^{debt} should receive debt & give release before ~~a~~ ^{an} ~~admt~~ ^{admt} granted, he might after ~~a~~ ^{an} ~~admt~~ ^{admt} recover them again for the Right of action was not in him. Hod. 119. 126. Lwin 6201 - 5 Co. 202.

So the Ex^r before Probate may sell, give away or otherwise dispose of the goods of the deceased, but it is otherwise in case of an ~~admt~~ ^{admt}. 2 Bac 413. Gov. 174 - Went. 34-49 - 1 Com. 238.

So if a Bond of the Testator be conditioned for payment at a certain day, which happens after testator's death, but before Probate, it must be paid by the day to the Ex^r or at Ex^r. the penalty is forfeited. 2 Bac 413. Went. 34 - Gov. 174.

So otherwise if bond was made by testator, the Ex^r must pay, it by the day, tho before Probate or the forfeiture ensues - Gov. 174 - But now, by Stat. 4. Ann. Penalties are claimed in Courts of Law, on payment in Court of Principal, Interest & Cost. 2 Bac 413 - 3 W. 691. 2 - 671-2.

A person named as Ex^r is said to be a complete Ex^r for all purposes except that of bringing actions, for he cannot bring actions it is said before probate. (Gov. 174) For 1st It does ~~not~~ ^{not} apply at all, except in two cases viz: Actions of Debt and other actions on the Testator's contracts & to such actions for Tort, as are committed in the life time of testator.

Therefore before Probate, he maintains, Trespass Trover, Replevin &c for injuries done to the assets after Testator's death, since in this case, he may declare upon his own facts. 2 Bac 413-41. Went. 35-50. Gov. 170 - 1 Com. 183-138. 1 W. 33-83 - 2 Bul. 260 - Salk 302-7.

He may indeed maintain an action in his own name without describing himself as Ex^r. Gov. 174 - 2 Bac 413 - Carth. 154 - Hence a prospect of letters Testamentary is not necessary. 2 Bac 444 - 61 Hod. 92 - 1 Hod. 62-3 - 2 Kebb. 668.

So before Probate he may distrain or avow for Rent when the reversion for a term of years comes to him from

The Executor & the next accedes after the Testator's death, because
 the next after the reversion is vested in him, yet he could not
 do there acts if the next acceded during the Testator's life time -
 1 W. 302-7 - Leav. 174 - Hen. 300-170 - 1 Roll 917 - 2 Bac 412 1 Com 238.

Exr's.
 &
 Admrs.

So before Probate he may maintain debt on a sale
 of Testator's goods by himself, for here the contract is his &
 not the Testator's. 1 Com 238 - Leav. 174 - Vent. 41-52 -

With respect to actions of Debt & other actions on the
 Testator's contracts, it is not true as laid down (5 Co. 29) that
 the Exr. before Probate cannot bring actions in this case.
 9 Co. 39.

It is clearly agreed that he may commence an ac-
 tion before Probate tho he cannot maintain the action
 or declare before Probate. This with may be tested before Probate; it
 is safe if he produce his Letter Testamentary at the time of
 declaring when he must make proof; there remove the
 impediment "ab initio". 2 Bac 413 - 1 Roll 917 - 1 Com 238 -
 Skid. 23 - 3 Lev. 58 - Hen. 370 - Ray 481 - Comb 371 - 1 W. 302-3-7.

Of Co-Executors.

If there are several Executors they are deemed in law
 but as one person, representing the testator; their interests are
 joint, entire & undivided; therefore it is a general rule that the
 act of one is the act of all. 2 Bac 395 - 1 Com 240 - Godol. 134 -
 Lac. 21 - Amib. 310 - Vent. 75 - 1 Roll. 926 - Dyer 23^a - Co. 8. 347.

Hence the passⁿ of one is the passⁿ of all, a sale
 or gift of the assets by one is valid, it being regarded as the con-
 tract of all. So a Release by one of debts, actions &c. is bind-
 ing on all. So if one grants his interest in the Testator's assets
 to his Co-Exr.; nothing passes by the grant for each has
 passⁿ of the whole before 2 Bac 395 - Godol. 134.

Suppose one grants his interest in the Testator's terms or
wants to a stranger the same power, for each has an entire
& undivided interest. 2 Bac. 395. 3 Geo. 23. Godol. 134. 5. 2 Co. 21.

The case of Co. 21st is diff^r from that of Joint Tenants
for each test^r is possessed of the whole, there being no parts
or moieties in their possession. Godol. 134.

One test^r cannot have an action against the prop^r
ty of the estate of testator as to the other. 1 Com. 89. 240. 1 Hale
117-10. 2 Geo. 23. Godol. 135.

But test^rs have a right to plead diff^r pleas, therefore
a defendant of 11th Geo. 20. confessed & paid, a 1st will, will a 1st
test^r will be liable on a 1st will. 1 Hall 949. Godol. 135.
1 Com. 240. 241. 20. 2 Bac. 39. Stat. 1 Geo.

But one of two test^rs cannot make a valid re-
lease, nor convey an interest so as to bind the others. Both
must join, for the authority of 1 test^r are joint & entire.
This rule is not commonly doubted. Godol. 134. 1 Com. 240. 241. 20.
1 Hale 450. 2 Geo. 23.

There is an exception to this last rule when the test^rs
may sue in their own right, as in 11th Geo. 20. declaring upon
their own possession. Hence they are considered as principals
& not as representatives & hence one may release the right
of action. 1 Hale 460. 2.

If one of the test^rs dies the power survives to the
other. As in the case of 11th Geo. 20. 1 Com. 263. 2 Bac. 416. 241.
26-30. 2 Geo. 21. 1 Com. 440. 11 Geo. 7. 3 Geo. 23. 20. 21.

It is said that an test^r may compel his co. test^r to
account with him in 11th Geo. 20. for a moiety of the effects. 2 Bac.
396. 241. 20. 21. 22. 23. 24. 25. 26. 27. 28. 29. 30.

So if the test^rs are made residuary legatees one may
sue the other in the Spiritual Court for a moiety for he
is in the character of a legatee. Godol. 135. 11th Geo. 20. 21.
2 Bac. 396.

It is a general Rule, that one *Co.* is not chargeable *Co. re.*
for the money of his companion & he is no further liable than
for the assets which come to his hands. 2 *Bac* 395. *Gadol.* 134 - *Adm.*
Went. 100. *Co. b.* 310. Yet if all the *Co.*s join in giving a rec^t.
for money actually rec^d by one only, all are liable as to
creditors, as if they had all rec^d, i.e. each is liable for the whole.
This Rule however is diff^r in Equity - there the actual receiver
is only liable - for receiving is the substance, joining is only
matter of form in giving receipt. 2 *Bac* 396.

As all the *Co.*s make but one person in law,
they are regularly all to be sued together & all must sue. *Went.* 95.
La Mo. 307 - *q. Co.* 37 - 2 *Bac* 396. *Gadol.* 134 - 4 *Ell.* 565.

If an action is bro^t ag^t an *Co.* a plea that another
is also de^t without averring that the latter has administered
is ill; for if the *Co.* de^t has not administered, the pl^{ff}. is not
bound to know, that he is an *Co.* 2 *Bac* 396. 1 *Dev.* 161. *Id.*
242 - But if an *Co.* sues alone, it is sug^t for Def^t to plead
that there is another *Co.* without averring that he has ad-
ministered, because the fact is not supposed to be within his
cognizance. 2 *Bac* 395-396.

If an action is bro^t ag^t one of several *Co.*s & he
does not plead the mistake in statement he loses the advantage
of it. 2 *Bac* 396. *Carth.* 61. & 611.

In an action by *Co.*s all must join, tho' one has not
p^{ro}ved the bill or is within age, or has refused before the Proctor
ag^t. 1 *Lam.* 291. *q. Co.* 37 - *q. Co.* 130. *Went.* 95. *La Mo.* 3.

If in case of two *Co.*s one refuses to accept an Proctor
yet he must be named & there must be a summons & service. *La Mo.*
307 - *q. Co.* 37 - *Gadol.* 134.

The object of Summons & service is to prevent the *Co.*s,
who do not act, from releasing; its effect is to take away his pri-
vity or priority to the suit, & make him no party 2 *Bac* 396-7.
Went. 96. 104 - *Co. Site* 139 - *Co. b.* 652 - *Fl. &.* 120 - *Hall* 90.

But if trespass is committed on the goods of the testator, while in possession of one of several executors, he alone may sue for it; for here he need not sue as executor but on his own possession. Gadol 134. 1 Bac 397. note. Wren 104 - if contrary rule is holden in some of the books on the ground, that the part of one is the part of all. 3 Geo. 204 - 1 Bac 397 - 1 Atk 462.

Of an Executor de son Tort.

An executor de son tort is a person without any authority from the deceased, or from the Ordinary, does such acts as belong to the office of executor or administrator. 2 Bl. 507 1 Bac 307 Went 171 Gadol 96 1 Com 261 2 Co. 61 2 T. R. 99.

In general any unlawful act or intermeddling with the assets of the deceased will make one executor de son tort, or a stranger. 5 Co. 33 4th Went 171. Thus taking possession of the assets & converting them to his own use, paying debts out of the assets, receiving & suing for debts due the deceased & in general all acts of acquiring transferring or passing the assets, will make any person unauthorized an executor de son tort. 2 Bac 307 1 Roll 410 - 2 Co. 105 - 57 - Hob. 49 - 2 T. R. 100 - 5 Co. 33 - 4 - The value of the assets taken is not material, milking of Cows is sufficient. 2 Bac 390. 2 Co. 166. 2 T. R. 100 - 3 T. R. 590. As to his liability, authority see here vid. 4 C. R. 650. 1 Atk. B. 211.

As paying legacies out of the assets taking a specific legacy without the consent of the executor, or by pleading when sued as executor, any other plea than "ne unques executor." 1 Bac 307 - Gadol. 91 - 2 Went. 174 - 1 Roll 910 - 1 Com 264 5.

As the widow of the deceased becomes executor de son tort by taking more apparel than is convenient for her dress. 1 Bac 307 - 1 Com 265 - 2 Co. 166 - 2 T. R. 97.

If a stranger takes possession of the assets & delivers them to another, the latter is executor de son tort. 2 T. R. 97.

By the Stat. 31. Eliz. If goods be given by fraud to a third person, or a release be given by fraud of a debt, the donee or releasee becomes *Co. de son Tort*. 2 Bac 387-8-1 Com. 265- Geo. 2. 406. 810- Co. 28.
Adm. 28.

If one intermeddles with the assets, even in pursuance of direction from the deceased, he is *Co. de se*. 2 W. 97--

A fraudulent gift by the testator himself will make the donee an *Co. de son Tort*, as to creditors from the necessity of the case, but not as one of kin. legatee &c. for it is good as to them. 2 Bac 605- 1 Roll 649- Yelo. 197- Geo. 2. 271- 2 W. 97-

But one may do many acts relating to the effects of the deceased without making himself an *Co. de son Tort* 2 Bac 388. 1 Com 265- Geo. 2. 94- Geo. 51- Thus: finding or taking care of deceased's cattle, paying debts of the deceased with his own money- repairing buildings when suffering for want of repair, providing nurses for the children &c 2 Roll 507.

So taking the effects under claim of property unless the claim is merely colourable more artifice, for in the former case he does not undertake to act as *Co. de se*. 1 Com 264 Dyer 166^a. 1 Roll 104. Intermeddling with Real estate does not make a person (in *Co. de se*) *Co. de son Tort* 1 Root 104.

What acts are sufficient to make an *Co. de son Tort* is a question of law. 3 W. 94- The true principle of discrimination is this- viz. If the act of the stranger be such as fairly warrants the inference, that he claims the management & disposal of the assets, he is *Co. de son Tort*, but otherwise not. 2 Bac 388- 1 Com 126- Dyer 166- In the first case the act is such as belongs to an *Co. de se*.

The above Rules as to what makes an *Co. de son Tort* apply in their fullest extent only to cases where there is no rightful *Co. de se* or *Co. de se* & to those where there were

none at the time of intermeddling, for after Probate of the will or after the Ex^r has otherwise administered or after adminⁿ granted, common acts of intermeddling, i.e. taking passⁿ &c, converting or imbezzling will not make an Ex^r de son Tort, for there is a rightful Ex^r & the goods taken after Probate are assets in the hands of the rightful Ex^r. They having come to his hands 2 Bac 306-5 Co. 34-Salk 313-19 Jurin 289-300. Yet the wrong doer is liable as a Trespasser to the Ex^r. Salk 202-6-7- 2 Bac 413-41

But even after Probate, if a person not only intermeddles, but claims to be Ex^r he is chargeable as Ex^r de son Tort. 2 Bac 308-5 Co. 34-Salk 313 & it seems from Salkeld, that this claim may be enforced as to subject him from certain acts, such as receiving & paying debts, tho. not from common acts of intermeddling &c, as are in the nature of common Trespasses. Salk: 302-7- 2 Bac 414-41-3 Bac 308-5 Co. 34-44 Salk 313.

If the intermeddling be before Probate or in cases of intestacy before adminⁿ granted, the stranger intermeddling is an Ex^r de son Tort, tho. the act be nothing more than taking passⁿ & he is liable as such to creditors, unless he delivers over the goods to the rightful Ex^r. before action bro^t. 2 Bac 308-5 Co. 33-Salk 297-313-1 Roll 910-Geo 6. 565.

The ground on which an Ex^r de son Tort is liable to creditors is, that from his acts creditors have reason to presume, that he is the Ex^r & legal representative & he has no right to disprove that presumption, when his own wrongful acts have raised it 2 M. 99 3 M. 590-12 & Had 441-71- 2 Bl. 507-6-0-

An Ex^r de son Tort is liable to all the trouble without any of the profits & advantages of an Ex^rship thus he can be sued as such, but cannot sue as Ex^r. 2 Bl. 507.

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He cannot retain for a debt due himself, nor other ^{Exor} may do, even a ^{Admrs} creditor of an equal degree. Moor. 527. Cro. 630. Nels. 137. 2 Mod. 57. 12 Mod. 441. 71. Stra 1106. 1 Com. 266. 2 Bac. 388-9. 5 Co. 30. But if he pays debt with his money, he may retain so much. 1 Com. 266. Stra 1106. 2 Ven 188. Hils. 337. Roll 923. 1 Sid. Carth 104. So if after intermeddling he obtains administration, he may retain for his own debt, as a ^{Admrs} creditor of equal degree. H. Auth. For the better of c. Schur. purges the wrong, except that he is still liable to be sued by the name of Execr de son Tort; he having however after Schur. gained the privilege of a rightful Schur.

A Rule apparently contrary to this last is, that an Execr de son Tort obtaining Letters of c. Schur. may be charged as Execr for that he shall not discharge himself for any thing "ex post facto" 2 Bac 391. 3 Geo. 190. Cro. 183 385-810 565-102

But the rule says, nothing more it seems, than that even after c. Schur. obtained, he may be described in a suit agt. him as Execr: & that he cannot avail himself of being so described, as to abate the writ, for any other purpose the wrong is purged. 2 Bac 391.

An Execr de son Tort is liable as far as he has assets to the rightful Exor or Schur: to all creditors of the deceased & Legatees. 5 Co. 30. 2 Bac 391. Cro. 51. Hob. 49. 1 Com 266. Went. 257. Car 104 Roll 919.

An Execr de son Tort, when sued by the rightful Exor or Schur is not described as Execr de, but as a stranger, &c. a Trespasser. 1 Com. 266. 2 Bac 279-88. Car. 103-4. Salk 295. 1 Ven 349. Stra 904.

But if the Execr or Schur be a creditor of the deceased, he may bring debt agt. him as Execr de son Tort, with the averment, that some of the assets come to his hands. 2 Bac 379. 1 Roll 940. Hils. 389.

In actions by creditors he is named Execr gener.

ably. 2 Bl. 587 5 Co. 499 11 Co. 200 11 Co. 266 5 Co. 211 11 Co. 266 11 Co. 266
 Whit. L. 291.

It is a general rule that all *de son tort* are liable only to the extent of assets received & as a general rule they are allowed all payment made to other creditors of equal or superior degree. 5 Co. 30. Went. 10. Cur. 104.

He may plead *plene administration* & give such payment in evidence in support of the issue. But usage, the rightful *creditor* or *debtor* he cannot be pleading such payment near the action & the plea if such payment is therefore ill. 12 Mod. 441 71 Went. 171 11 Co. 274. 5 Co. 30. Cur. 104. 2 Bac. 390. Note. 2 Bl. 507 8. Went. 349 50. 2 Bl. 23.

Yet under the general issue, he may be allowed in mitigation of damages. The amount of such payment, unless perhaps the rightful *creditor* or *debtor* is prevented from recovering for his own debt. These lawful acts however, bind the property thus disposed of as if. The rightful *creditor* or *debtor*. Went. 349 50. 2 Bl. 23.

Thomas *de son tort* is chargeable only to the amount of assets actually received. Yet if he pleads *negligence* & is in an action by a creditor, he is liable for the whole demand, whether he has assets or not to that amount. 1 Com. 266. Went. 257. 2 Bac. 390. 1. Cro. 4. 572. Hob. 49. It is said in these cases if he pleads *"plene administration"* he shall not be charged beyond the assets received. 1 Com. 266. Dy. or 160. 6.

It is said however if the value of the assets are not trifling the *de son tort* may be relieved in equity. 2 Bac. 390. Went. 167 8. 2 Bl. 147 8.

If there be a rightful *de son tort* they may be sued jointly or severally but it is otherwise in case of a rightful *creditor* for an *action* & *debtor* cannot be joined in actions. 1 Com. 266. Went. 255.

At B.S. The testator's debtors of an estate de son test were liable to creditors and in equity 1 Com 266-2 Mod 293. But by the H. 30. Car. 2. they are liable at law to creditors 2 Bac. 391- Dow. 51. 4 Burn's Lect. §. 491.

Exrs.

Admrs.

In one case there may be originally an Exr. de son test in case of a gift by deceased to defunct creditors.

Of Making & Debtor's Executors.

By the old

English Law if a debtor was made Exr. his debt was discharged. But now the debt of such Exr. are assets in his hands for the payment of debts, legacies &c. The reason given for permitting the Exr. to retain the debt was that he could not sue himself, but tho' this reason might have been assigned, with propriety in case of debtors yet they were not allowed to retain agt. creditors. Pies. C. 4 38. 9. Latb. 240- Bro. Par. cas. 179. 2 Bl. 512- 5 Co. 30-136- Hob. 10- How. 104- Latb. 299- 303. 1 Roll 921.

So if there be suff. assets to pay all debts & legacies he may still retain his debt because the debt is considered as a residuum. 5 Co. 30-136- Cro. 373- 4 Fel. 160- Latb. 306.

And it is the opinion of Judge Reeve, that he is discharged only when he takes the residuum. There has been, it is true no decision, recognizing this principle, but a clear proof that it is a true one is, that the debt of an Exr. who is never entitled to a residuum, is not discharged by his appointment.

In England, the Exr. as such is residuary legatee, unless there is something in the Will clearly manifesting the testator's intention that he should not be. 2 Bac 379- 1 Roll 920- 4 Fel. 160. Cro. 373- Latb. 305-6. And as his right to withhold the payment of his debt agt. those who claim under the Stat. of Distribution is founded on the idea, that he is entitled to the Residuum. Quere? If he had such a legacy as would bar his right to the residuum, can he in that case retain his debt against all claimants?

Of Making Creditors Executors.

A Debtor may make his creditor Ex^r. in such case, the Ex^r may retain so much of the Testator's assets as will satisfy himself, but must be understood when the debt is of an equal degree with such creditor. For if he is, but a simple contract creditor, he cannot retain ag^t. a creditor by Specialty, or any other of a superior nature. 2 Bac 371-4-5-8. Plow. 185. Flitt. 178. Went. 130. 1 Gard. 115. Salk 304. Mollat 496. 2 Bl. 512. And the rule is the same with a Judg^t. 3 Bl. 18.

These rules from the nature of the case are both reasonable & just, for as the creditor, who first commences the ^{an} action gains a priority to all others in equal degree & as an Ex^r cannot bring an action ag^t. himself, he must unless allowed to sue for his own debt be postponed to all others in equal degree. 3 Bl. 18.

But an Ex^r de son tort who is a creditor cannot retain, for this would be allowing him to take advantage of his own wrong. 5 Co. 30. 2 Bac 397. An Ex^r is not obliged to take in part when there are not suff^t. assets to pay all the debts. 2 Atk. 411.

Of an Executor's right to the Residuum.

In England, if an Ex^r is appointed it has been a question to whom the surplus or residuum of personal property after the paym^t. of debts & legacies belongs. 2 Bac 470 3. Went. 4. 2 Bl. 514. Salk. cas. 240. Bro. Par. cas. 279.

Formerly the Ex^r himself was considered as residuary legatee, but now if any inconsiderable legacy not appropriated to any particular purpose, be left to the Ex^r. or if there can be collected from the will an intention, that the testator should not take as residuary legatee, the

Court of Chancery will order a distribution as in the case of *Admors.*
Admors. Still however if no such intention can be inferred,
 from the Will, the Ex^r will be considered as residuary leg-
 atee. 3 P.W. 43. Bro Ch. 81. 1 Vern 493. 2 Atk 47. 3 Atk 256.
 300. Roper 220. 1. Bro. P. cas. 179.

An Ex^r in England has no wage for his trouble &
 Legacy has the Ex^r's right to the residuum in those cases.
 anywhere it is a 'forced proof' of intention in the testator that the
 Ex^r should not have it. Roper 230 2 Ves. Jr. 465-75.

Parol Proof is inadmissible to show, that notwith-
 standing the legacy the testator intended the Ex^r should be
 residuary legatee. But this rule does not hold *vice versa*
 (Roper 230 2 Ves. Jr. 465-75).

It is laid down by legal writers, that in cases of this
 nature parol proof is admissible to rebut an equity or an
 wrest an application, i.e. that parol proof is admissible to es-
 tablish the old legal import of a will or other instrument,
 when such import varies from the equitable construction,
 yet such proof cannot in this case be admitted to establish
 the equitable in contradiction to the old legal construction.
 But the former must be collected from the instrument it-
 self. 2 Atk 60. 220. D. Pow. C. 417. 3 P.W. 40. 2 Ves. 90. Will 319
 - 1 Vern 473. 1 Bro. Ch. cas. 201 20-320. Talb. 240.

Of Wills.

A Will is the
 Declaration of the mind of the testator, uttered by word or in writ-
 ting, disposing of an estate & to take effect from the death of the
 testator. So every Will there must be an Ex^r. 5 Bacc 497.
 Car. 30. A Will not appointing an Ex^r is called a Testament.
 Pow. 9. 23. 4. 7 T. B. 146.

Generally a person not labouring under any disability.

may dispose of his personal chattel by will on his estate 200.
140-1. And in all cases the presumption is that he was of sound
discretion & ability, so that the "onus probandi" lies on those
who would combat the will. 2. Moor 310. Co. Litt. 89. Bro. Chas.
314.

But persons of the following description cannot make
a will viz: 1st Idiots & Persons of non sane memory, as Demented;
2^d Soged persons cannot make a valid will if it appears
from his conversation at the time of making that he was
not of sound discretion. 3^d If the testator was unable thro' igno-
rance or blindness to read the will, it must have been read
to him & such reading must be proved. What degree of in-
capacity is requisite no definite rule is established, the
Court generally relying on the opinions of the witnesses to
determine whether the testator was in possession of his
senses or not. 4th Generally deaf & dumb persons cannot
make a will, but proof may be admitted to show, that such
person knew the contents & had sound understanding
to make a judicious disposition. 5th A Drunken
Man cannot make a will. 7th An Insane Person cannot
make a Testament of lands or goods - 2 Bl. 375. 496. 7. notes 1. & 2.

A Will made under any restraint or fear is in-
validated & it would seem that in this case the cause of fear, whe-
ther actual or imaginary ought not to be regarded & the age of
discretion for making wills, is according to some author-
ities 14 in Males & 12 in Females. Others fix it at 15, but
Judge Reeve thinks it is 17, because according to Ed. Hard-
wick the Civil law governs in this respect, by which the
age was 17. 2 Vern 469. 2. Mod. 310. Co. Litt. 89. Pre. Ch. 316.
2 Bl. 496. 7.

A Husband cannot dispose of his wife's Chases in ac-
tion, Chattels Real or Paraphernalia by will, tho' he may
dispose of all by deed, except the first kind of Parapher-
nalia. 4 Repor 51. 2 Bl. 435. 6.

How can a person by will dispose of property holden

Dors.

&

Admrs.

in Joint Tenancy because the joint account is
interposed between the right of the testator & that of the
devisee & devisee.

A Remainder of a Chattel interest made, by way
of executory Devise, be limited over after an estate for life
provided, that the Remainder may be in case at the time
of testator's death or first devise & that the first contingency
on which the remainder is to vest, happen within a life or lives
& 21 years & the quarter of a year. 2 Bl. 73. 2 Bro. Ch. 33, 107. note
20.

The Life man must lodge an Inventory of the property
limited over in the Court of Chancery & if in certain circum-
stances must give security which shall be forthwith coming.
2 Bro. Ch. 2-379-30th. 394.

An estate ^{tail} cannot be created in personal property. &
if Personal Property be given in England to a man & to the heirs
of his body, the absolute ownership vests in the first taking
possession of it; The reason assigned for this by English Law is
is, that an estate tail in personal property cannot be barred
by Fine or Recovery & therefore if such to exist it must
be a perpetuity which the law abhors.

A Will of personal property ought regularly to be in
writing, signed & published by the Testator. It is not necessary
there should be subscribing witnesses as in the case of devise
of real property & the testator's name written by himself or it
be in any part of the Will is sufficient. There is indeed an in-
stance given by Lord Mansfield, where the Testator's name was written
by another, yet being approved of by the testator was holden
sufficient. Signing, Quere, is signing indispensable? 2 Bl. 504 2
Cases Rep. 452.

But if the testator cannot write, his mark with his
name written by another person, will be sufficient. It is said too,
that this will, if it be in the handwriting of testator without sign-
ing is good & so also if it be in the handwriting of another per-
son in certain cases.

It is laid down as a general rule that if a will both of real & personal property be well executed as to the personal, it is valid as to the real. In other words, if it is intended that the intention of the testator ought not to be defeated in the will in good faith, this intention as to that part ought not to be disregarded.

But their remaining is not satisfactory, for it is not improbable that one part of the will was made with one eye to the other, & that the intention of the testator would be violated by permitting the Deceased to take all the personal property & then come in for a share of the Real.

A Will in Mercantile Wills might be made of
personal property, but the restrictions, imposed upon these
kind of Will by Stat. 2d. Car. 2. have almost abolished them.
2d. 500.

Duty of Executors & Administrators.

The first duty of an Exor. or Adm. is to make out an Inventory of all the estate which can be ascertained in his hands & to procure an appraisement of it by judicious persons under oath; after this the Exor. or Adm. must account with the court of probate for the property inventoried, but he is not liable at all events to pay the amount of the appraisement if the estate is sold for less, for the loss the Exor. is not liable unless it was incurred by his own negligence or fraud. 2 Bl. 495. 207-15. 2 Bac 1413. 1 TR. 274-484. They are not bound to purchase any part of the estate. 1 M. & P. 3. - *Ca. of a man in error, who sold the estate for less than the appraisement.* But if the loss does happen then the fault he is liable on his bond to an action by his creditors, but if creditors sue in common form for their debt, they must ground their actions merely on the Inventory. 2 Bac 490. Durn. 280.

Court of Probate for the assets of the Sale. Aug. 20th.

Exrs.

A Judge of Probate ought not to reject an inventory of property the title to which is disputed, for his decision cannot affect the right of trying the title at C. L. Term. 100.

The Exr. is never liable to creditors until assets are recd by him, unless he has made unreasonable delay. Shep. 472. Gov. 46-7-22

If the Exr. submit to arbitration & the arbitrators award agst. him the payment of a certain sum he cannot afterwards aver the want of assets as to that claim, as fast as assets come to his hands his liability increases. 7 T. B. 452. 3-5 T. B. 6-61-671-6 T. B. 691.

An executor, as such, is not personally liable. 1 B. & C. 162-8. 2 B. & C. 16-17 C. 691. The power & duty of an Exr. & Adm. are nearly the same; there are some points in which they differ. They are bound to their testators or intestates creditors as to the amount of the assets only. 2 B. & C. 395-400. 100- C. & L. 310.

The Payment of Debts.

The Exr.

or Admin. is bound to observe a certain order in the payment of Debts viz: 1st Funeral Charges & expenses of the Will being proved. 2nd Debt due the King by record or Special. 4th 3rd Debt by particular Statute as Forfeiture. 4th Debt by Record. 5th Specially Debts. 6th Debts by Simple Contract. 3 P. M. 402. T. B. 277. 2 T. B. 521 4-2 T. B. 511 2 B. & C. 432-1 T. B. 690- Day 430. Vid. Stat. of 1796. 2 P. M. 511. 6 C. M. 154.

This part of the original law does not present a very agreeable picture to the mind, for simple contract creditors whose claims are often more meritorious being postponed to all others, may be defrauded of their whole debts.

If debt of an equal degree the Ex^r may pay which he pleases, but he cannot prefer a debitum in presenti solvendum in futuro, to those already payable unless the latter are of an inferior degree. 2 Bac 434 - 3 Lev. 57-9 - Rob. 315. 1 Com. 242-4 - 2 Bl. 511.

If an Ex^r pays a creditor of a lower degree while there are others of a higher degree unpaid & he has no assets, he is personally liable. Yet he is excused if he did not know the latter. 1 M. 640. - 2 Bac 435 - How. 279 - 1 Sid 230 - 2 Shaw 492.

A creditor may gain a preference to others in equal degree, by what is called legal diligence by first obtaining Judgt. 2 M. 413 - 3 M. 401-2 - Galb. 217 - 4 Blo. Par. cas. 287.
A Voluntary Bond is postponed to all other debt, but preferred to Legacies. 1 Atk 292. Cas. 56.

If a Creditor objects to the payment of a bond given by the deceased, on the ground that it was voluntary, The Ex^r may by Bill bring the parties into Chancery at their own expences to litigate their claims & make payment according to the decision there given. An enquiry may be always made into the cons. of bonds, when third persons are interested. Quere? 1 Id. 1. M. R. 20.

An existing debt ag^t the estate of the deceased ("debitum in presenti solvendum in futuro") but ascertained within the time limited for the exhibition of claims is not foreclosed but may be recovered, but may be recovered of Ex^r or Adm^r if he has assets. Kirb. 36 - 1 M. 1043 - 3 M. 262.

It is the duty of the Ex^r to retain assets for the payment of such debts & if he should afterwards become Bankrupt before payment. Quere: Whether the creditor can pursue the assets into the hands of the devisees & legatees. It seems reasonable however on principle, that the creditor can pursue them in this as in common cases.

No time is limited in the English law for the exhibition of claims ag^t the estate of deceased persons.

If the Ex^r refuse to inventory and account prop-
erty, knowing it to be the deceased's, he is liable on his bond.
But if he has his doubts with regard to the ownership of the
property, it seems reasonable, that the creditor should in-
form him in making the inventory. There might not the cred-
itor in this case be refused of the Ex^r to inventory, he
having settled the whole of the estate before (discovered) to be out
(Adm^r "de bonis non")

If the Ex^r having paid out the whole estate, observing
the priority of claims & is sued, he may plead plene administra-
vit

In case of Insolvency, where the Ex^r is able to dis-
charge part of the debt, beside general charges, & if a
creditor sues for more than his average, he the Ex^r need
not must produce the process of court in his defence.

Of Legacies.

After the pay-
ment of Debt, the next duty of Ex^r is to pay the Legacies. A
Legacy is defined to be a "gift or bequest of particular goods
or chattels by Testament" & the person to the person to whom it
is given is styled the Legatee. 2 Bac 466 Godol 271 2 Bl. 512.
An Ex^r to whom a legacy is given may not prefer
himself as in the case of Debt. 1 Vera 434.

At the death of the testator the immediate right of
the legatee commences, tho' the legal property of the legacy
still reside in the Ex^r, & he may dispose, even of a specific
legacy for the payment of Debt. The assent of the Ex^r vests
the legal property in the legatee, any slight matter may amount
to an assent. Co. Dite 111-2. 4th. 590- Geo. 427 35-6- Roper 190-
2 Leg. Cas. 465- 3 East 120-4 Co. 20. 2 Str 70- 2 Ves. 209.

An action lies at Ex^r for a pecuniary legacy up-
on promise by Ex^r in Cons. of assent. Co. 284-9- Secus, if not
actually promised. 5 2 L. 690.

Ex^r
Adm^r

Pecuniary & Specific Legacies

Specific Legacies are bequests of things which can be specified or identified. Pecuniary Legacies are bequests in sum of money in general terms, which do not identify any particular parcel. *Reper 25. Wren 31. 2 H. 638. 1 B.W. 1175. 2 Salk 416. 1 Mac 417. 3 Atk 96. Bro. Ch. 60. Bro. 467.*

Pecuniary Legacies are liable to creditors before Specific, tho' both are liable if the first are not suff. *Reper 25. Bro. Ch. 60.*

But if a part of the Specific Legacies be taken for the payment of debts, the legatees whose parts are not taken are compellable in Ch. to make a reasonable allowance to those whose Legacies are taken. *Reper 113. Wren 204.*

This rule obtains only when it is necessary to take a part of the Specific Legacies for if the Exr. takes any Specific Legacy when there are assets suff. he shall be liable for the amount of the Legacies so taken - If a Specific Legacy is lost or destroyed by any unavoidable accident, the legatee must bear the Loss. *Reper 23. 111. Bro. Ch. cas 160-1. Atk 422-95. & 122.*

After payment of Specific Legacies if there are not assets suff. to pay all the pecuniary legatees, there must be an average. *Reper 111. 1 Atk 422-95.*

But if there is not suff. to pay all Specific Legacies those who are first paid are always preferred & there shall be no average between them - There are cases when pecuniary legacies are preferred to Specific, but this preference depends on the intention of the Testator. *Bro. Pre. Ch. 294-3. Reper 113.*

Thus if all the personal estate at a particular place or places be bequeathed in Specific Legacies & afterwards a Pecuniary Legacy is given & he paid out of the personal estate already disposed of to the Specific legatee there being no other personal estate elsewhere - that Specific Legacy

is charged with the payment of the afterwards granted pecuniary Legacy. Bro. Ch. Pre. 292 - doubtful.

When the testator said that B. should be paid at all events, before the other pecuniary legacies & assets fall short of paying the whole, B's legacy must abate with the other notwithstanding pecuniary legacies are not preferred. 1 Vern. 30
As to furniture given to widow for life 5 Co. 326.

Vested and Lapsed Legacies.

A Vested Legacy is one which of course vests in the legatee at his representative. A Lapsed Legacy is one which cannot be taken by the legatee, but sinks back into the residuum.

If a legatee dies before his testator, his legacy lapses. 2 Bro. Ch. Cas. 296 1 PM. 700 11 M. 601.

The residuary legatee if there is one, is entitled to the lapsed legacies but there is none appointed by the will, lapsed legacies go according to the Stat. of Distributions. Law 296 2 Vern. 207-8 374 5-70- 521- 916. Pre. Ch. 200. 470.

If it lapses by a failure of a condition on which it is given, it goes to the residuary legatee. 2 Vern. 394 5.

A Legacy may be made with a "proviso" that if the legatee die before the testator, or before legatee arrives at a certain age, it shall go to another, (next of kin), & such limitation is good. Pre. Ch. 470 2 Vern. 207 374 5- 521 611.

A Legacy given to A. payable at a certain day is a vested legacy. But a Legacy given to A. at a certain age does not vest until A. comes to that age & so if he die before the time specified, it becomes a lapsed legacy. Pre. Ch. 21. 2 Bro. Cas. abt 295. The 820. 1 Ves. 542 - 2 Vern. 342 - 1 Vern. 56, 61 62 - 2 Vern. 207 370- 521- 673- 2 PM. 10- 610- 3 Bro. Ch. Cas. 471.

This distinction seems to be so over nice, probably, tends to defeat the intention of the testator. The Rules of distinctions are not however without exceptions.

Nevertheless if on a Legacy made in this manner interest is made payable the legacy is vested. 2 Vern 679-1 N. 469-1 Bro. Ch. cas 3-305-75. 1 W. Ch. 313. 2 Atk. 512-3 Atk. 645-2 W. 463.

If such legacies are charged on real property & the legatee dies before the time at which they are payable in one case & given in another, they shall lapse, this exception is taken for the benefit of the heir, who is a great favorite with the English law. 2 W. 276-D. 610-

Another exception is that when a Legacy is given at a future time, is to be paid out of a certain fund which yields an annual income it is vested (see supra)

Chancery will compel the heir to pay a legacy charged on the land, yet if such legacy lapses before, or if it is vested the legatee dies before the day of payment the heir will hold the exclusion of the Residuary legatee, or those who claim under the Stat. of distribution. 1 Atk. 502-52-2 W. 276. The same principle is shown to devisees, on whose devise, legacies are charged. 11 Atk. 1.

The person who is entitled to a lapsed legacy may demand payment immediately after the death of the first legatee provided (scilicet) a year & a day he passed & no day is fixed by the testator. 2 Vern. 31 203.

Conditional Legacies.

The general rule is, that if the condition is in favor of the grantee he cannot take until the condition is performed, but if the condition is illegal or fraudulent, it need not be performed & the legacy will vest. Thus, if a legacy is given on condition & not disputing the will & the legatee commences a suit whereby he disputes the validity of the will yet this is no forfeiture of the legacy, if there was *proleabilis causa litigandi*. 1 Rep. 42 2 Vern. 91. 11 W. 201.

Legacies to which are annexed general conditions, in restraint of marriage, most absolutely & the conditions are void being injudicial to Society and they hinder the propagation of the Species. 1 Houb. 266. And when the condition is that the legatee shall not marry a person of a particular profession or religion. 1 Vern 211. 1 Cowp 313. 479- 1 Houb 86- 1 Houb 249- 252. 1 Sta 211- 1 Bos 154-

But a legacy left by a husband (having children) & his wife on condition of her not marrying, is exempted from the above rule for the husband is supposed to have in view the education of his children & on account of this the condition is allowed to be binding. 1 Vernon. 20- 2. Houb 86- Godol. 45. & 456- Notif there be no children or the legacy be given by a stranger, the legacy would not & the condition would be negatory, there being as it is said no good reason, why widows should not marry as well as Maids. Godol. 46.

So restrictions of marriage before a reasonable age & not to marry at a particular place has been adjudged good, as also not to marry a Papist. 1 L.M. 285- 1 Houb. 249- 1 Sta 267- 1 Vern 20.

Legacies given on condition of being forfeited if the legatee, without the consent of a particular person, marry, &c. are not subject to forfeiture unless limited over to another upon breach of the condition. 1 Vern 199- 1. 4th 502- 1 Prec. Ch. 565- 1 Houb. 249- 52- 3 Bos 430- Does this Rule apply to conditions (see Supra)?

Where Legacies are well given.

What words constitute a legacy? Godol. 201. 2 Vern 467. It has been adjudged that Grand children may take under the description of "children" if the Testator had none living but there is no other case. 2 Ves. 206 2 Vern 116.

14th. A last Will, being made when the testator was presumed to be on his death bed, the law regards his intention, rather than the import of the words actually used to signify that intention & therefore any words that manifest the intention to create a legacy is sufficient. Godol. 284. 2 Vern 467.

2nd. In all descriptions, whomever claim the legacy, the intention must be sought. So if a man devise legacies to all his children & grandchildren, it is held to extend only to those who are in esse, at the time when the will was made. Dyer 177. Co. Litt. 112. Pre. Ch. 470.

Property given to be equally divided among testator's relations or among his "poor relations", or among his relations of a "good moral character" is to be divided according to the state of distributions, the description being too general to have any efficacy; this doctrine is now fully established, Ves 527. Pre. Ch. 461. Talb. 251. Contra, 2 Vern 381.

When property is given to a number of children to distribute among them according to the discretion of a particular person named in the Will, the division will stand unless manifestly unjust & monstrous 2 Vern 421. 513.

It is said by Godolphin, that in order to find out the true meaning of the testator, with respect to the things intended to be given away, it is necessary chiefly to regard the time when the Will was made, for it is presumed that he has not altered his mind, unless it otherwise appears by sufficient evidence. In another place he observed that this Rule must be understood, as the Testator makes use of the words in the Present or Future Tense, & that if they be doubtful whether they refer to time past or future, they shall be understood as relating to the time to come. Godol 272-4.

But it is now settled that a gift in a will of all the testator's personal property, all that he had at the time

After death & no more will pass, whether the quantity of personal estate will be increased or diminished from the time of making the Will. See in b. 410 d. 11237-212638. See
Admrs

The rule respecting real property is diff. & all that the Testator had at the time of the Devise only shall pass not what he might have between the time of making his Will & his death.

& man's personal property all being bequeathed in a particular place, extends to all that he may have afterwards in that place. 2 Ves. 680.

As a Bequest of a Particular at a certain place, the thing passes, whether it was at the specified place, or not, at the time of the testator's death.

A Testator gave £100. & then said "out of the £100 which I give, I give B £50". It was decided in this case that "when the words of diminution were added, they took away the whole from the legatee first named - & left all the the testator had intended half for each."

When a Legacy shall be a Satisfaction of a Debt or Duty

The doctrine obtained in Chancery for more than a century was that if a man gave a Legacy to a creditor it should be considered a Satisfaction for the Debt, if the legacy were equal or superior in value to the Debt. tho' not otherwise. See 103 20th 132, 616 24b 227-563 - See b. 1239-294 1126. 124 521 2. 4th. 200 21st 177. This rule it was supposed was supported by the intention of the testator & on that position it stood for a long time undisturbed. But succeeding Chancellors rejecting their supposition, laboured hard to take particular cases out of the scope of this rule & now by repeated adjunctions it is virtually abolished.

The following exceptions are taken to the Rule: 1st The legacy to operate as an extinction of the debt should be

so expressed, i.e. "that it shall be in satisfaction of the Debt."
 20th. 226 note - 10th. 410 - 20th. 555-616 - Pre. Ch. 129. 236. 95. 309
 425 - 11th. 263 501 - 2d. 409 - Rev. 105 - Rep. 163.

2nd Description: That it should be payable at the same
 time, or at least as soon as the Debt is payable. 3d. 11th. 263
 Pre. Ch. 236.

3rd That there be no clause directing previous pay-
 ment of just Debt 10th. 410 Rep. 160.

4th. That the Rule does not apply against an il-
 legitimate child.

5th. That the intention of the testator to extinguish the
 Debt by the Legacy be apparent. 20th. 555.

6th. That it be expressly given in Payment.

If several legacies are given to one person & are
 exactly the same in quantity & quality & in the same instru-
 ment, they are not administrative; but otherwise if the same
 request is given in the Will & in a Codicil, it is administra-
 tive, unless there are some circumstances showing a con-
 trary intention in the testator. 10th. 423. 5 - 2d. 410. 213. 11th.
 Ch. Cus. 309 - 2d. 506 - 2d. 236 - Swinb. 526.

A legacy to a wife or other person entitled to money
 from the testator by articles of Marriage Settlement is gene-
 rally considered as intended to be a satisfaction in all, or in part
 of what is thus due & tho' the legatee may have her election
 as to which she will take, yet she shall not take both. 3d. 11th.
 53 - 1 Rev. Ch. 205 - Rep. 170 - Pre. Ch. 138. 263 - 11th. 95 - 2d. 115.
 255 - 349 - 429 - 555-6 - 10th. 3 - 424.

A Gift to a legatee by testator during his life is to
 be considered as part of the legacy bequeathed by the Will
 made previous to such gift. Pre. Ch. 263 - 11th. 95 -
 2d. 115.

Redemption of Legacies.

358.

Case.

The redemption is the taking away of a legacy which may before bequeathed. *Swainb. 522. 3 Bac. 470.* The redemption of a legacy is never presumed, but must always be proved. *Swainb. 522.*

The accidental destruction or alienation of a legacy may be an redemption, or may not, according to circumstances, but it is not necessarily such, for the legacy may be specified, it may be replaced by a similar article. *3 Bac. 470. Swainb. 522.*

To determine whether there be an redemption, or not, recourse must be had to the intention of the testator, if the alienation cannot be accounted for, but upon the supposition of the testator's intention to redeem the legacy it is an redemption. *Fac. 205. 2 Bro. Ch. 600. 204 Vern 638. 81. T. Ray 25. or 85.*

But if the legacy be so lost or destroyed or disposed of, that any other intention can be inferred it is no redemption. *Swainb. 522. 4 Rep. 390. or 39. 40.*

If a debt be bequeathed and the testator calls it in for no other purpose, than to take it away from the legatee it is an redemption. *1 Hen. 601. T. Ray 25. 35. 129. Cas. 309.*

But if payment of a debt bequeathed was unsolicited, by the testator or the debtor is failing, or if the testator was in want of money, the receipt of the debt is no redemption. *The Exr. it is answerable for the value of it. Mod. 373. Forrest 228. 2 O. W. 164. 828. 2 Hen. 601. T. Ray 35. Amb. 401. 2 Ver. fr. 6. 309. or 39. Rep. 356.*

In many cases also when the legacy is destroyed as when a House bequeathed is consumed by fire, & a new one is erected by the testator in its stead, there is no redemption. *Rep. 36. Forrest 226. 2 Ver. 605. Swainb. 523. 4.*

So when a man gives his daughter £200. by will & afterwards by her marriage gives her the same sum or more

The lease will be extinguished 2 Vern 25. Bro. Ch. 218.

If the testator bequeaths a certain sum to one of his children & in the same instrument gives the same sum over again to the same legatee, the second disposition is but a repetition of the former.

It is laid down as a rule the rebutted by showing a diff. intention, that if the testator bequeathes to a grand son, & specifies him in a particular place, they must be there at his death to give effect to the legacy. Roger 379. - Grant 30. Ch. 129. 14th. 537. But the removal of grand son of a child before testator's death is no ademption. Roger 39. Wes. 273.

Debts and Paying Legacies

The Ex^r is not obliged to pay any legacies till the legatee give security & refund if debt should afterwards appear, for as was before remarked no time is limited within which ~~time~~ creditors must exhibit their claims agt. the deceased. 2 Ves. 338. 2 Vern 208. Cowp. 287.

If a legatee on receiving his legacy have not given security & refund, he is not obliged to do it if debt should afterwards arise 2 Vern 208. Ch. Car. 145. 1 Vern 94-160. Cowp. 285-7.

This rule however does not operate, if the Ex^r when he paid the legacy was ignorant of existence of debt afterwards appearing, or if he be compelled in Chancery to pay them 2 Vern. 360. 2 Ves. 193. Sco. 194. 210. 3 Bac. 483. Cowp. 207.

Judge Boone thinks an action for money had & rec^d would lie since in such case the money is paid by mistake & the Ex^r fault.

A creditor may come upon the assets of his debtor in the hands of his legatee by a Bill in Chancery, if the Ex^r is

insolvent; but not otherwise 4 Ves. 193- 1 Vern 94- 2 Ab. 205- 2 Hen. 2d. 358.

Pecuniary Legacies shall abate in proportion to the deficiency of Assets. 4 Vern 71- Cro. 467.

If a legacy is given to the testator for his care & pain it has no preference but must abate in the same proportion as others 2 Vern 434.

As one legatee may compel a pecuniary legatee to refund when the assets become deficient tho there is no provision for refunding & tho he has a remedy against the testator & may compel him to pay it out of his own pocket, if he voluntarily paid away the assets to the other legatees. Ch. Cas 136- 240. 2 Ven. 360- Roper 112.

Payment of Legacies.

1st The testator ought to be careful in the payment of legacies & take a proper receipt, or have a suff. voucher because it is holden that such an equitable demand, as is not barred by the Stat. of Limitations. After a length of time a legacy may be presumed to be paid. See Ch. Cas 11 Vern 216- 2 Ro. 21- 404- 1 Warr. 571- Roper 101.

2nd He ought to be careful to pay legacies in proper hands, for without a decree, or order of a Court of Equity he cannot pay them unto fathers or other relations of Infants. See Ch. or Ch. Cas. 240.

And if without such decree or order one testator pays a legacy to the father of an Infant, he does it his own risk, but if he pays it to an infant's Guardian for ever & the Guardian gives a receipt to discharge his trust faithfully. 1 Warr. 205- 5 Co. 10- 29- 2 W. 10- 10- 103- 3 Mac 405- 1 Leg. Cas. at 300.

If a legacy is given to a feme covert it must be paid to her husband. 2 Vern 204- 207- 50- When a legacy is given to a

some covert, who lives separate from the husband & it is paid her & she gives a receipt for the same, it is has been decided an assize brot by the husband, that the legacy should be paid over to him with interest. 2 Vern. 261. Roper. 96.

And when the husband & wife are divorced a mens et thoro, it has been adjudged that the husband alone can release a legacy left to his wife. Cro. Jac. 908 - a 90 - 8 - 4 B. & 108. Moor 665 - Mordaunt 891 - 2 Vern. 609. But this rule does not hold when property is given to the sole & separate use of the wife.

3.^d If no time be appointed by the testator for the payment of a legacy, it is payable in a year from the testator's death; this rule is copied from the Civil law. 10 M. 636. 20 M. 88 - Roper 95 - Gould. 272 - 2 Attk. 415 - 2 Bro. Ch. 39 -

A legacy is payable to the representatives of a deceased legatee at the time originally fixed for payment. 2 Vernon 31 - 199 - 203.

The person entitled to a lapsed legacy may demand payment immediately after the death of the first legatee, provided a year & a day he hath & no time is fixed by the testator. 2 Vern. 31 - 203.

4.th If a legacy is devised generally it is regularly to carry interest, from the expiration of the first year after the testator's death. Is a demand necessary? In case of the non it carries interest after a year without demand. 2 Attk. 415 - 2 Vern. 251 - 60 - 2 Bro. 206 - Prec. Ch. 161. Roper 68. 1 Ves. 310 1 Vern. 261 3 Bro. 130 - 2 Attk. 109. 7 M. 106. 26 - 1 Ves. Jr. 367.

But if the legatee being of full age neglect to demand at the time, he cannot have interest but from the time of demand. Roper 68 - 2 Attk. 109 - 1 M. 106. 26 - 2 Ves. Jr. 367.

And there may be remarked a difference between a legacy & a debt, the latter of which there being no time fix-

As to the demand for payment, it is interest whether it
 demanded or not, the reason of this difference is that the testator
 who is trustee is not like a debtor bound to search for the
 person whom he owes, it is safe if he advances the sum
 only in his trust when demanded. 1 Sp. 104. Exors.
Admrs.

But if a legacy be given generally & no time ascertained
 for the payment, yet if the legatee be an infant, he shall be entitled
 to interest from the end of the first year after the testator's death
 no demand be made, because a trustee shall be imputed to
 him. 2 Salk. 415. 1 Vern. 251. Pre. Ch. 161. Pow. 209.

If the legacy be appointed by the testator himself to be
 paid at a certain time, it is not fully settled whether it shall
 bear interest from the time fixed or from the time of the de-
 mand; & Modern authorities give over the latter opinion.
 2 Salk. 415. Pre. Ch. 1161. 3 Bro. 487. Quen. Repor 1703. 3 Atk. 697.
 2 Atk. 110.

If a legacy is made payable to a child of the testa-
 tor even at a future date or time & no other provision made for
 its maintenance, it shall bear interest from the end of the year
 immediately following the testator's death, because the father
 was obliged to have provided for it while living & it is presumed,
 that he intended, that it should be maintained after his death
 1 Eq. cas. a br. 301. 2 Atk. 329. 3 Atk. 101. Repor 70. 1 Atk. 310. 2
 Ventris 346. 4 Atk. 200. The legacy given such infant carries int. from
 time of testator's death. 4 Atk. 200.

Suppose a legacy to be charged on Blackacre, which
 produces an annual Rent, interest to be paid. 2 Bau. 240.
 Assent by text. to a legacy unnecessary. What amount to an
 assent? "I give you say", does not, tho' once it was so construed
 10. There must be something clearly evidential of consent. 1 Bos.
 525. 2 Ven. 300. 250. Co. Litt. 58.

Legacies How Recoverable.

The method of recovering legacies is by a bill in the

Ecclesiastical court or by Will in Chancery only. 2 D. Ray. 437.
 10th 315- Casp. 104- 2 Broc 1409. 3 East 110. 1 Atk. 100. 7 M. 665-
 5 M. 690- 1 M. 593. In M. legacies are recoverable at law. 4 C. 12. 635.

Neither in Chancery nor in Ct. can a legatee recover his bequest till after a year & a day.

Chancery compels the payment of a legacy on the ground of Trust, tho' of personal property. Palm. 170- 2 Show. 50-

If the ex. should promise to pay he may be liable in a Court of law; the promise & payment must have been a cond. & by stat. of frauds, must be in writing. 2 Ray. 45. 23.

As to Residuary Legacies.

A Residuary legatee is one appointed by the testator to take the residuum after payment of debt & other particular legacies. Hence when the debts & other legacies are paid & discharged, such residuary legatee, if any one is appointed, will take the surplus to the exclusion of all other, except in case where legacies charged on real estate are lapsed, or lapse for the benefit of the heir. 2 P. W. 276- 1 Atk. 551- 2 Bl. 512.

If the residuary legatee discharges the debt & is satisfied that it does not appear how much the surplus will amount to, yet the executor or adm^r of such legatee shall have the whole residuum of the personal estate, after all debts & legacies are paid & not the best of the first testator. Carth. 57.

So if there be residuary legatee & the test. omit part of the testator's effects out of the inventory or under value, those which he puts in - the residuary may file a Bill of discovery against him before he has paid the testator's debts. 3 Broc 404- Palm. 409.

But if no residuary legatee be appointed under the will & the testator's ^{intention} is or can be shown, that the ex. should not be residuary legatee, the Residuum is distributed, as tho' the testator died intestate. 2 Ans. 33. 1 Ven 473- 2 Ven. 4. or 74- 707- 10 M. 9- 550- 3 P. W. 40.

Donative Causa Mortis.

This is a specific present made by a person in contemplation of death & it is always conditional. If the donor recovers the donee is not entitled to the property. 1 Bl. 514.

Exce.

In
Adm.

There must be a manual tradition of the thing given or some act amounting to it by the donor. 1 Wm. 406-41-5 1 W. 357 1 Wm. 2. 1-20.

If the donee die the legal property of the donation vests immediately in the donee without the intervention of any other person; to give effect to a "donative causa mortis" there must be a manual tradition & not in person.

A gift of this kind is not good against creditors but an action lies against the donor because he is not interested with the gift. Judge Bacon supposes that the creditor is his claimant against the donee, must not bring this action against the latter as Case de son Earl, for the representative of the deceased, being bound by the gift the executor cannot win other cases in rem, the proper course is to sue the donee to recover it.

It seems that a "chase in action" of a negotiable nature may pass as a "donative causa mortis" but if it be not negotiable the later opinions seem to be that it will not pass. But Chancery may protect the assignment, as in other cases 1 Wm. 406-41-3 2 Wm. 224-242-357 2 Wm. 214-2 Wm. 431 See Hardwicke's opinion at large.

Distributions.

After the payment of Debt & Legacies the residuum is handed to make out a distribution of Personal property vid. Stat. 2nd. 2nd. In England the mode is settled by Stat. 22 & 23. Car. 2. which directs that after payment of Debt, Legacies & the widow's share the surplus shall go to the Children & their repre-

representatives & if there be no children to the next of kin. and their no representatives. & no representation is admitted among collaterals beyond brother's & sister's children. Sav. 66-72 explained by stat. 29. Car. 2. Ray 496 - 2 Ray 571-2 Ins. 38.

As the Ecclesiastical Courts have the management of the estates of deceased persons. The rule of civil law was adopted to determine who are next of kin pointed out in the stat. of Distributions. The distributary share vested in the kindred of the testator at his death & of course is absolute tho' the claimants die before distribution. 2 Bar 449-

& distributary share vests in an infant in ventre sa mere under the stat. of Distributions. & no distribution is made till after the expiration of one year from the testator's death, 2 Co. 60. 66.

The personal estate goes to the next of kin in the descending line & their legal representatives, i.e. children & their issue ad infinitum. 3 W. 56 - 2 Ves. 213 - Pre. Ch. 28 - Hale & B. 236-7.

So long as any the old stock in any of the lineal degrees, the estate goes per stirpes juxta Representationis. But after the old stock is extinct, the estate is distributed per capita, not per stirpes. Some however contend that the distribution in this case is per stirpes. Ganeless agrees to this rule. But Judge Reeve supposes, when there is no representative as in this case, the distribution is per stirpes. Sav. 71 - Pre. Ch. 54 - 2 Bar 429 - 1 Co. 202

Of Persons related in equal degree to the deceased no distinction or preference is given except those in the descending line, who exclude ancestors & collaterals, whatever may be the degree of kindred. In the Civil law, proximity in the common quantity of blood is regarded in calculating degrees of kindred. 1 Ven. 316-323.

Exors.

Adms.

The just representation among collaterals extends no farther than to the children of Brothers & Sisters. Beyond this degree, kindred can claim in their own right only. 1 Rth. 25-594-3 Rth. 50- 2 Rth. 203-5- 1 Rth. 454 & 1 Rth. 44. If then the Brothers & Sisters of the proprietor be dead & a part of their children also, those nephews & nieces, who survive shall take the whole estate to the exclusion of grand-children & nieces of the proprietor, i.e. to the exclusion of the grandchildren of the Brothers & Sisters of the proprietor.

The Stat. Jus. 11. placed the Mother in the same rank with Brothers & Sisters in the distribution of personal property. But the degradation of the Mother takes place only when there Brothers & Sisters living. 1 Rth. 458.

In the distribution of personal property no distinction is made between the whole & half blood. The Civil law which regulates the distribution, regards the proximity & not the quantity of blood. Ven. 316-23- 2 Rth. 74- 1 Rth. 458. If the father of the person deceased be living, the mother takes nothing because whatever she might take, belongs to the husband. If after a Divorce of a Father & Mother in vinculo matrimonii by Parliamentary Act for Adultery the son die, his father & mother being still alive, it is debated whether the mother would be entitled to any thing or not. But as the father's right to personal property has ceased in this case, it would seem that on principle she would have a good claim.

If the divorce were only a mere separation she could not claim any share of the personal property of her children while her husband was living, because the husband's right to her personal property still continues, tho' after his death she might, & in all cases where the marriage was not void ab initio, she is entitled to a share after the death of the husband. The Brother according to the English adjudication takes to the exclusion of grand parents; But are these decisions reconcilable with the governing Rules? 3. Rth. 726- 1 Rth. 4. Cadol. 253.

Children "in loco parentis" are by the Court considered as being in loco & capable of taking & enjoying according to the Rules of descent & in favour of such an Infant an injunction may be granted to stay Waste, Breach, &c. 2 W. & A. 274 - 75 - 2. 11. 5.

Cases Distributed.

1st John Stiles died leaving a wife & 3 Children - $\frac{1}{2}$ goes to his wife & the remaining $\frac{2}{3}$ to his Children. 2nd Case. J. S. died leaving 3 Children & no wife. The estate is divided among them per capita.

3rd J. S. leaves 3 Children. He has a Son of his wife dead. The 3 Children take each $\frac{1}{3}$ & the grandchild the remaining $\frac{1}{3}$.

4th J. S. dies leaving a child C. - his Child C is dead leaving a child D. & his Child B is dead leaving children V. & W. In this case C. the child of J. S. takes $\frac{1}{2}$ being issue of the deceased, D. takes another $\frac{1}{2}$ being the legal representative of his father C. & the other $\frac{1}{2}$ is divided among the children of B - his representatives who take per stirpes.

5th J. S. & his Child are dead, but C & leaves a child D. - B leaves E & F. & C. leaves H. & I. - The old stock being extinct representation of course ceases & of course the Child of D. B. & C. take per capita, all standing in the same degree.

6th J. S. dies leaving two children B. & C. his child A. is dead. & so is his (A's) child, who leaves D. & E. - The children B. & C. take each $\frac{1}{3}$ & D. & E. the remaining $\frac{1}{3}$ - as the represent of their father.

7th J. S. left a wife but no issue, his father Dick & his Mother Molly, his Brothers & sisters of the whole blood Peter John & Sally - of the half blood Sam. Stiles & Susan Rowe, & his uncles George & Edmund Stiles. The wife takes half of the estate according to the Stat. there being no issue & the father the other half.

8th The only relatives living were Sam, Dick & Sally. Exors.
&
Adms^{rs}
 They are all of the whole blood; & Sam & Sally are the
 brother & sister of the half blood & his uncle George & Adm^{rs} & Adm^{rs}.
 The brother & sister of the whole blood take in exclusion of
 the Uncles, per capita they being in the second while the Uncles are
 in the third degree.

9th The same as the last, only Sam & Sally are dead
 without issue. So Sam dead but left a child Jim. Dick &
 Sally are entitled to $\frac{2}{3}$ of the estate being the next of kin to the de-
 ceased, Jim the child of Sam is entitled to the other third being
 the legal representative of his father Sam.

10th All the Bro^r & Sisters of D. are dead except
 Sally but Jim child of Sam, and A & B children of Dick are
 living. In this case, Sally takes one third of the estate as next
 of kin Jim another $\frac{1}{3}$ & A & B the residue, being representa-
 tives of D.

11th All of D's child^{ren} are dead. Sam left a child Jim.
 D. left A & B. Sally left P, Q & R. In this case the whole estate,
 being extinct, representation ceases, & those D's uncles Geo.
 & Ed^d together with the child^{ren} of Sam Dick & Sally divide the
 estate per capita, being all of the 3rd degree of kinship.

12th Same as the last case only the uncles Geo.
 & Ed^d are dead without issue. All the Grand child^{ren} being
 all the same degree & next of kin, divide the estate per cap-
 ita equally.

13th The same as the last case except Jim is
 dead, leaving 3 child^{ren} A, B & C. Here A & B & C take
 the whole of the estate in exclusion of the child^{ren} of Jim, be-
 cause representation extends no farther than 3rd degree.

14th Jim is dead leaving A, B & C. also D leaving
 D & E leaving F. G. leaving H. I. J. K. L. M. N. O. P. Q. R. S. T. U. V. W. X. Y. Z.
 In this case the only one of the 3rd degree that survives takes
 the whole estate as next of kin to the exclusion of the chil-
 dren of Jim. A, B & C.

15th The same as the last one. It is not an
 issuing issue, but the father is living & will
 divide the estate as he pleases.

16th The same as the last one. The father is dead
 & the mother is the sole trustee of the estate, but she is not
 an issue.

17th The same as the last one. The father is dead
 & the mother is the sole trustee of the estate, but she is not
 an issue. The father is dead & the mother is the sole trustee
 of the estate, but she is not an issue.

18th The same as the last one. The father is dead
 & the mother is the sole trustee of the estate, but she is not
 an issue. The father is dead & the mother is the sole trustee
 of the estate, but she is not an issue.

19th The same as the last one. The father is dead
 & the mother is the sole trustee of the estate, but she is not
 an issue. The father is dead & the mother is the sole trustee
 of the estate, but she is not an issue.

20th The same as the last one. The father is dead
 & the mother is the sole trustee of the estate, but she is not
 an issue. The father is dead & the mother is the sole trustee
 of the estate, but she is not an issue.

Distribution is comellable in Chancery
 1 Nov 134. 2 Nov. 262. 1 Nov 284. 2 Nov 204. And it is
 a General Rule, that the Personal estate is to be distrib-
 uted according to the laws of the County or Country in which
 the intestate resided at the time of his death 2 A/31. 406.
 1 Nov. 25. 2 Nov. 35.

Advancement.

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Exr 72

By the Stat. of Car. 2. every child except the heir at law, if he has rec^d from the father an advancement during his life, shall in order & be entitled to a distribution under that Stat. being what he has rec^d into Hotchpot. Co. Litt. 1, 50. Pote. 267. Britton. 72. Stat. 4 Ed. 2. 20. 26.

This rule however operates in those cases only, in which the father dies intestate as to the whole of his property & if he die intestate as to part of his personal property, a child advanced by him in his life time need not bring such advancement into Hotchpot, in order to have a distributive share as to the part of which he died intestate. Pre. Ch. 170. Will. 446.

Whatever is given for a marriage Settlement is an advancement. Will. 435. 2 Bac 430. 2 Poth. 434. Reg. Canal 747. 2 Vernon 640.

It seems that the doctrine of advancement does not prevail in cases where a man has property of which he is ignorant, or which he does not notice in his Will. Pre. Ch. 170. When a son by deed acknowledges he has rec^d his portion in full of his father's estate & acquits & discharges it from all claims. holden an advancement. 4 Ed. 2. 20. 26. 2 Poth. 143. When a man gives a greater legacy to one child than to another & dies intestate as to part of his estate, this is not in the nature of an advancement. For an advancement must be made in the life time of the testator. 2 Poth. 44.

Devastavit.

Any act or negligence of the Ex^r or a child by which the assets are lost or injured subjects him to a Devastavit on which execution goes de bonis propriis and releasing Debt at a discount. Submitting to an Arbitrament accepting less than is due - Ex^r paying an unreasonable charge for funeral charges - suffering the property to be injured of the deceased, out of his pocket &c. 2 Bac 431.

When in these cases a hand is given he may be charged on the hand, -

If there are two debtors one having assets the other none & the former commits a default, both may be sued in the first instance in the usual form & judgment. But if no assets be found "none" will be returned - a decree facias will go agst. both & the judgment will go agst. the receiver only.

If there are debtors one is not liable for a default of the other unless he has directly or indirectly consented to it, for a default is in the nature of a trespass. -
 See 13-20. or 1720-21 Bar 114.

Actions by & agst Executors & Administrators.

In some cases the testator or intestate might sue when the executor or administrator cannot. There are also some cases, when the testator or intestate might be sued when the executor or administrator could not.

The rule of distinction in these cases in which the executor or administrator may be sued in account of the testator or intestate & those in which they may not, has been laid down thus: That the executor or administrator is liable for the contract but not for the tort of testator or intestate but neither branch of this rule is strictly true for there are cases in which the executor is not liable for the contract of testator or, and others in which they are liable for their tort. The rule as now established as to the tort appears like this, "if the tort committed by testator or intestate have benefitted his estate", they (executors) in these cases maybe, are liable. But on the contrary the action does not survive agst. them, even though the estate of the aggrieved has been injured by the tort.

Judge Rogers apprehends that the enquiry should not be whether the asset have been benefitted but if another has been injured by such act.

347.
 Exrs.
 Admrs.

It is said that the liability is derived from the equity of "4 Ed. 3 'de coheretatis arboribus'". In the old rule the word 'heredes' is said to be raised, but the word in the printed sta. is "bonis". Euc. says the Sta. impose a liability on them or make give them a right of action. 2 Rep. 439-45-1 Com. 211-1 Ven. 30. The Sta. above has been construed to all injuries to persons &c. has made it less beneficial to ex. & ex. may have. Trusts &c. - Ch. R. 52. 78. 9.

When the right of recovery for the tort of the testator or intestate survives agt. the Exr. or Adm. the action must not be brought agt. the latter assailing in tort, but in contract & the usual mode of recovery is by assumpsit which cannot be traversed. Co. L. 372-2. L. 549-4. Mod. 403-1. L. 314-D. Ray 991, or 917-1502-11 an. 30. Chappin Lant. he agt. Ex. etc. 4. Mo. R. 400.

If an action would survive agt. an Exr. or Adm. which was brought agt. the decedent who died pending the suit, the action does not abate. But if it be an action that would not survive it will & must abate. If therefore an action be brought agt. a testator on a right of recovery which would survive agt. the Exr. & the action be sued in tort the suit according to strictness of principle must abate & the plt. must resort to an action sounding in contract agt. the Exr. & when the action is well as the right of recovery, is such as will survive agt. the Exr. or Adm. Lucius must be issued & summoned the Exr. & answer the first Co. L. 372. Co. L. 377-965.

To a Sci. Fa. agt. an ex. he cannot plead any matter which have been pleaded in the original action. L. R. 203-1. L. 102.

It has been observed that there are some contracts of the testator which will not survive agt. the Exr. The rule of discrimination in this case is, that whenever it is generally the case, the contract is such that the testator has recd. or is to receive any consid. from the other party on the performance of the contract, the Exr. is liable. 1. Sec. 429. An Adm. can't join with surviving promisor in prosecuting an action. 1. Mo. R. 104.

But when according to the contract the testator was not to receive any part, from the other party, but a compensation arising itself, from the performance of the contract & in which the other party was interested; if he fails of performance thro' mere negligence, his Ex^r is not liable, as if an Officer who is to receive legal fees from the exon of a process, fails thro' negligence to receive it.

Formerly no action survived up^t the Ex^r in those cases in which the testator might lose his ~~Ex^r~~ ^{Ex^r} (C. 377-600.

In some instances also the Ex^r could maintain an action, when the suit is commenced by the testator & is of such a nature that it would survive in person. If the Ex^r, or Testator dies before Judg^t, the Ex^r may make himself a party to the action by suggesting the death of the Pl^{ff}. & entering his own name instead of the testator on the Record C. 377-600-9 C. 87.

According to the Stat. of W. M. if testator die, his Ex^r might sue united, in which case he becomes a party to the suit & Judg^t goes ag^t him as Ex^r. But on the other hand if the pl^{ff} were dead & the Ex^r neglected to enter his name, the debt would be remediless.

The Ex^r may sue in his own name when the cause of action is founded on a contract of his own or has accrued since the death of the testator. 4 M 200-

The Ex^r when sued by a creditor of his testator is not obliged to take advantage of the Stat. of Limitations, But if he thinks the demand just, he may suffer Judg^t in this case to go ag^t him, without being guilty of a Default. 1 Atkins 524

Whether the Ex^r is obliged to take advantage of the Stat. of Limitations or No is a question on which the Eng. auth^s disagree.

It is settled that in gen^l he is obliged to take advantage or avail himself of any illegality in the course of the Contract, but it is doubted whether this rule extends to Debt, which in honor & conscience ought to be paid. The Exor^r is not perhaps warranted in availing himself of those legal advantages, which the testator might.

31.
Exor.
&
Adm^r.

A Court in chancery had decreed to the use of an Exor^r as stock, which he joined, with a Court for money had &c to the use of the Testator. 3 Blk 500 - Chit. P. 204.

But h^l cannot join in one action or cause of action, those which accord to him as Exor^r & one that he has in his own right. 1 Blk 489 - Stra 1271.

If that person which the Exor^r said will, when recovered to assets in his hands, he must sue in his representative capacity. Quere. Is the Exor^r in all cases of this kind to sue as such or does the rule mean, that unless he sues in this way, he is liable costs. It cannot mean that he is obliged to sue as Exor^r nor is he exempted from paying costs in all cases. 2 Blk 120 - 5 Blk 234 - 7 Blk 350 - 1 Shaw 57 - 7 Mo. Bear. vid post 3 493. 3
550 - When a promise is made to an Exor^r, he may sue as Exor^r. 1 Blk 487. & to what cause of action may be joined vid Chit. P. 203. 4. 6.

If a Exor^r bind himself as Exor^r he is personally bound & cannot plead "plene administravit" 1 Blk 691.

It is a Gen^l Rule, that when an Exor^r sues & is defeated, he is liable to no costs, for at Ex^r, no person is liable for costs who sues in their own right, Exor^rs therefore as they sue in the right of another do not come within the provisions of the Stat. 2 Bac 446. But does the above apply to Exor^rs only who are p^lps? Nutt. 69 - How. 100 - Ward. 165 - Crox. 500. 3 Blk 400. n. 5.

There is one case however in which an Exor^r & the p^lps shall be liable to costs. This is when he brings the action in his own right, as for a conversion or trespass in his own time. Stra. 602 - 610 - 94 - 101 - 1 Ven. 92. 3 Blk 400.

What Things are Personal Property, and Esse in re manens.

It is a general Rule, that all personal property goes into the hands of the Executor, & the real into hands of the Heir. & till there are somethings which seem personal which go to the Heir, & rather somethings that appear real that go to the Executor. Thus Fish in a Pond & Deer in a Park go to the Heir, but if the latter had been tamed, they would go to the Executor.

So too, an animal kept on land, tho' seemingly personal property goes to the Heir, while what is growing on the land at the time of the death of testator goes to the Executor - Co. Litt. 55.

The disposal of the residue of an estate "per autem vice", when the tenant dies during its continuance passes to the Executor.

Emblements are sometimes considered as real, sometimes as personal. Their loss of course, by death of the land & if an injury be done them it is a trespass, but as between the Heir & Executor the Emblements are always regarded as personal property, and also between the lord & tenant where the estate determines at an uncertain time. Where? & so the costs of the digging of which injures the freehold, they go to the Executor. I presume as well as the tenant for they are Emblements not Fixtures.

By the old law, every thing affixed to the freehold, however slight, was considered as part of the freehold or realty. But the rule is now clearly reversed for whatever is merely affixed to the freehold is regarded as personal unless its separation would materially injure

Rockingham Jan. 6. 1820 I hereby
certify that ^{this} enclosure contains ^{a copy of} all the papers
Nos. from 1. to 10. inclusive in the case of
John L. Ginnep vs. John G. Ginnep Esq.
as heard and determined this day before
me.

John L. Ginnep Justice of the Peace

Copies

\$2.50-

'Care

John T. Jones

or
John Gilman

What to which it is applied. This rule is now established holds
equally between Landlord & Tenant - See 4 Co. 121.
594. Fra 1142 - 2 Co. 410 - 110 - 400 - 3. 4th 13. 11

3/3.
Surre.
L
Admors.

Certain Chattels are by the Custom of England trans-
mitted, like real property by Descent, & are called Heir-
looms.

If a person die possessed of a term of years it belongs
to the Heir & Executor. If a Lease come to the Hands of an Executor
he must commonly add to the Inventory the Surplus of the
Profits if any, after deducting payment of Rent. & the rule
is the same with all annuities profits &c. 1 Co. 112.

If the testator seized in fee make a Lease the
Rent on his death goes to the Heir.

All Leases however distant the time, are real assets
in the hands of the Heir & Executor may grant him immediately
the Rent when they shall happen. See 1 Co. 112.

Legacies of Redemption on the Mortgage of testators
are in Equity real assets in the hands, but not at law. If the
testator grant an estate in Reversion or Remainder the future estate
of the Heir is a real asset when they shall happen.

If the Testator be charged or receive an estate in
reversion, the estate on his death is a real asset in the hands of the Heir &
he may compel a foreclosure. 1 Vern. 412.

The Heir also in this case may compel a foreclosure
if he will pay the money for which the land is pledged but not
otherwise.

That the duty of Personal property called Paraphernalia
is regularly due not go to the Heir or Executor.

The first kind of Paraphernalia never vests
in the Heir. The second and on deficiency of personal assets.
This subject however has been considered under another head.

Administration Bonds.

Administrators must give Bonds for the faithful discharge of their Trusts, and the test. are compulsory
 in giving "caution" i.e. security, they being
 trustees. 21 Jac 3rd - Car 407 - 2 Burr 365 - Shaw 294 -
 Suit on a Bond interest is allowed from time Judge Prob. made Decree - 1 W. 269.

No person can be a Jud. before he is 21 years
 old; & the person assigned is before that age, he cannot give
 Bonds 5 Co. 296 - 3 Jac 121 - Car 446 - Salt 39 - 11 Jay 320.

It seems like the case that when Bonds are required
 of Infants &c. They are binding notwithstanding the principle
 by the law. 1 Bond 76 - 1 W. 269 - 5 Co. 27 - 6 Co. 67 - Coke -
 Littleton 72 - 3/5.

If the Admin. do not inventory, or if he make a
 false account, or do not account, he forfeit his Bond.
 But the non payment of a Debt or Deceit isn't a forfeiture
 Salt. 316. 11 W. 269.

A non Distribution is a forfeiture -

375.
Exr. & e Adm^r must account.

An e Adm^r of one who was domiciled & died in
Eng. having taken out letters of e Adm^r there & afterwards
having taken out the same here, is not held to account
in this country for effects recd. by him in Eng. &c. &c. &c.

304.

386.

307

VIII. Evidence.

By the Court, & by the Jury.

I shall commence this subject by considering the General Rules of Evidence as to the Definition, viz. 3 Pl. 307.

1st The Admissibility of Evidence is a matter of Law, is like settled by the Court. But the credibility & weight of it is generally left to the Jury. 2 Pl. 25. Lang. 300. and 3 Pl. 23. For ex. production of a Public Declaration for a Battery is not a question should arise whether a threatening menace were admissible ev. the Court must determine it. By the Jury however must the question be settled "how far such ev. will tend to prove the matter in issue." The admissibility of the ev. which is always a Preliminary question & its Credibility & sufficiency are points to be determined on every trial.

When however a Record is put directly in issue by the plea of "Nulli Record" the weight & effect as well as the admissibility of it, are to be determined by the Court not by the Jury. 1 Pl. 6. 2 Pl. 330. 6 Pl. 53. 7 Pl. 117. 260. Lawes 146. 8-126. For a Record is of too high a nature to be tried by a Jury or by any way than by itself. 3 Pl. 331. Co. 117. 260.

And here I should remark to you, that in South of the Court tries every issue, as well of fact as of Law; they may decide questions of fact thro' the instrumentality of a Jury. For by the C. J. the Jury are but the mere instruments of the Court. Other questions have been tried by the Court thro' the intervention of other instruments. Thus we know of the Trial by Battle - by Trial by Hager of law by Verdict - the Trial of Marriage by Certificate by Record & by Jury all these are named in the same manner as instruments.

But when a record is introduced, incidentally and not introduced on an issue to the case it is taken as evidence to them. So in its effects it is conclusive. The facts which it imports to establish, as if the def. in a formal should, admit such, & been proved, as ev. of his title after an oral issue pleaded. The question then whether the Record is taken by the Court or Jury, is to be determined by the issue of the issue, is whether the record is put direct in issue or incidentally &c. &c.

Neither party is bound to prove those facts which are not denied by the other, for such part of the pleadings as are not denied, by the opposite party are of course admitted, & true. Thus if the Deon state an indefinite number of facts, & the def. say only one & traverse it alone he admits the rest, agreeably to a rule of pleading extend (to all traversable allegations. Pea. 4. 5 - 4 Bac. 2. 73. Dy. 103 - Bull 290.

II. In admission on the Record by one party, & an allegation on the other side, preclude the former from denying on trial the fact so admitted. So that one is not obliged to prove what is admitted & the other is not permitted to retract his admission, or deny his allegations in ev. Pea. 4. 5 - Daws St. 110 - Bull 209 - 2 Mod. 5

The Onus Probandi generally, lies on the party who takes the affirmative of the issue, for generally the negative does not admit gain the nature of things of direct proof. Pea. 5 Bull 297. D. 1 Mod. 144 - 649 - 4 Mod. 330 - 1 Will. 401. 150 - 102 401.

But there is an exception to this rule when one is prosecuted, for not doing an act which by law he is bound to do. Here the party prosecuting & alleging a negative, i.e. an omission takes the burden of proof, for & presume the negative would be to presume guilt which the law never does, and this exception

held as well in Civil as in Criminal cases. Thus suppose Civil
 a Turnpike Company, whose duty it is to repair a Bridge or
 Highway, is indicted for not doing the same. They are not bound
 to prove that repairs have been made, the prosecutor must
 prove they have not. the negative is here easily proved,
 but the facility of proof can make no difference and it is true
 in all cases, that when one is charged with an omission of legal
 duty, the prosecutor is bound to prove it. Gibb. v. v. 140-2 Edi-
 tion 192-200-1- Bull 290- Comb 57- 10 East 216- 2 Bl. R 551- 2
 Campb. 654- Killip's 157.

You will perceive a manifest difference between the last
 case & one in which there is a charge of positive wrong as of
 trespass or theft; here the party taking the affirmative takes all the
 onus - the party charged must show himself innocent. So that
 the general rule applies.

If the issue be taken on the life & death of a party once
 existing, the onus lies on the party alleging his death & the rule I
 trust does not depend on the mere form of the issue, but upon
 the substance of it, for being once alive the law presumes him
 to be so, till direct or presumptive evidence appears to the
 contrary. Thus in Wick. v. the Heir. Dgt. need not show the an-
 cestor dead alive, it is for the Heir to prove him dead. This be-
 ing the reason of the rule, it can make no difference what form
 the issue is, i.e. whether affirmative thus "J. S. is dead" or negative
 thus "J. S. is not living". This issue is often joined & I think the
 rule as laid down is universal. Pea. 313- 1 Kell 461 7 East 312
Killip's 152.

When however a person once existing has been out of
 the realm unheard of or unheard of for 7 years, the law presumes
 him to be dead. This was introduced as a peremptory rule by Stat.
 relating to Bigamy. But it has been extended by analogy to all ca-
 ses to which it could be applied. So that the fact of J. S. being
 once alive & that he has been absent for 7 years unheard of
 being proved, throws the onus on the party who wish to prove

him living, the presumption of death, being once raised remains conclusive unless rebutted. 6 East 80-5-2 Campb. 118 & Phil. 152-

So also where a legal marriage is proved between two parties, the issue of the children born, during wedlock or within a competent time afterwards are deemed to be legitimate & this presumption is conclusive till rebutted. These two facts appearing, the Onus is thrown upon the party who contests the legitimacy or on the negative of the question Phil. 110-152.

III^d Irrelevant Evidence. No other ev. can be received than the truth, than such as is pertinent to the issue or matter of fact in dispute; any other is called in Law irrelevant, i.e. irrelative or inapplicable & therefore inadmissible. See. 6-2 Ayl. 205.

Hence the Character of either party in a civil action cannot be called in question unless put in issue by the proceeding party, i.e. unless it conduces to prove or disprove some matter of fact material in the issue. Chief Justice in the margin of the term "putting the Character in issue". Tho the Books do not define it. See. 6-2 Swift, Chanc. 140 Bull 296-Phil. 101.

Thus in an action for fraud the Def. is not at liberty to prove that the Plf. is a bad man - i.e. in an action for slander that he is addicted to defamation, for these do not conduce to prove the matter in issue. See. 101.

Nor is the Def. in such cases allowed, by proving the contrary to support his Character - i.e. A sues B in an action of Battery, it is not competent for B to prove that he is "peaceably disposed". For the ev. in favour of his Character is considered as no more conducing to support his part of the issue, than ev. apt to maintain the allegations of the Plf. Bull 296- Swift. 140- See. Phil. 134- 2 B & P. 532 note-3. Caines. 20

IV.th But there are Civil Cases in which the character of the parties may be put in question because the character is put in issue by the suit. Thus in an action of Crime - Con. The Def. may in mitigation of damages not only impeach the general character of the P^l but prove particular facts of her adultery with others. For the D^f by charging the D^f with seducing her puts her character for chastity & her general behaviour in issue. It would be an abuse of language to speak of seducing a female already a prostitute. Note, therefore the distinction between this & the preceding cases. Bull 260 - 1 Adm. 20 - 1- 4 Ld. 1657 - Gilb. 113 - 2 Bul. 139 - Pea. 7 - 2 Esp. cas. 562 - Lw. 140.

But in the last case the D^f is not allowed to prove instances of her misconduct subsequent to her seduction for such misconduct might have been condoned by his own wrong. Pea. 7 - 2 Esp. cas. 561 - 1 Ld. 31 - Bul. 139 - Lw. 140

So also in an action for breach of Marriage-promise, the D^f is allowed to impeach the gen^l character of the P^l for chastity & to prove instances of her dishonourable conduct for the action puts her character at issue. 1 Ld. 31 - Note. 30 Hs. 6. 109 - 3 Esp. cas. 56 - 1 John. cas. 116.

Quere: How far he may impeach her moral character in any way & in every respect? For it has been holden in recent case (see 2d Ch.) that D^f might impeach the P^l's character for any immorality whatever for such abandonment of character might operate in a well regulated & sensible mind to break off the marriage.

But it has been holden that where the D^f seduced the P^l that civ. act. her gen^l character cannot be admitted in reference to the time between the making the promise & the breach of it. 30 Hs. 6. 109. This seems to me a correct distinction. See contra 1 John. cas. 116 - Where the above distinction is overlooked (Quere: would it not be more proper to say when the time of the seduction & the time of action but?) if reason for the above distinction is not 1st D^f shall not take advantage of his own wrong.

Sale. That under ev. of the gen. character for want of chastity
between the nation, the premise & the head of it, was in a smothered part
particular instance might be adduced. 2 Ms. A. 109. Baptism vs. Sallag

V. So also in an action for the seduction of his daughter or servant per quod servitium
hominis. The Deft. may in mitigation of damages impeach the gen. char-
acter of the daughter or servant for chastity or prave her conduct
shall been ridiculous. 1 Root 477. 3 Will. 19.

But how it may be asked can this effect the issue? The
gist of the action is the loss of service? So this I answer that
altho' loss of service is the gist of the action, yet it is not the rule
nor the principal ground of damages; but the real ground
of damages is the wounded reputation & affections of the plf.
and the most aggravated damages are given, when the loss of service
is merely nominal. 1 Esp. 2. 445. 3 Will. 19. Lawes Pls. 67. 8. 11 East
23. 5. 2 Selw 1007. 2 Lev. 63. (vid. tit. "Parent & child"). 779 post

In an action for Slander it is the constant prac-
tice in Ct. to permit the deft. in mitigation of damages to impeach
the gen. character of the plf. as to the existence of the fact or species
of crime charged by the words said; as where the charge was
Perjury evi. respecting his gen. character was admitted, because
the plf. in this case set up his character to be good & the evi.
goes to the point of damages. 1 Root 354-450.

So if the charge were of Theft. Deft. may prove the plf's
general reputation to be that of a Thief, under the gen. issue. So
on a charge of Bankruptcy, that the plf's gen. reputation was
that of a Bankrupt. This question arose in 1779. & the Court,
composed of 4 Judges were equally divided. 1 John: 46.

I was astonished upon looking into the Books that such was not
the practice in England. There is a particular instance in the English books
which is a case "sui generis" where the plf. having laid special daman-
ges by loss of friends. The Deft. was permitted to shew that his general

reputation was such, that his friends left him & not in consequence of the slander, that the desertion took place. 2 Campb. 251. Phil. 140.

In actions of slander the plff. may give in evi. his Rank & Condition in life, for the purpose of aggravating damages, & tho' I am not apprised of the adoption of that rule, in terms, in England, yet it appears to me to be obviously correct. 3 C. M. R. 581. Phillips 140. do also the Deft. may exhibit proof of the same kind, for the purpose of mitigating damages, when such proof will tend to effect that object. 2 B. & C. 200.

In an action for a Malicious Prosecution the Deft. may shew plff's genl. character to be bad, by way of shewing probable cause: This action lies, if in the original action there was malice & want of probable cause & therefore to shew a probable cause will be a justification. The genl. reputation of the Plf. if bad, rebuts the presumption of Malice & goes in a great degree to shew probable cause. Here the character is put directly in issue & that respect in which it is attacked, 2 Rep. Cas. 720. Phil. 139.

In Criminal cases where the Deft's character is put in issue by the Prosecution the Prosecutor may attack his genl. character by proving particular facts, for otherwise it would be impossible to prove the Charge or support the action. Bull 296. 1 McCal. 324. Pea. 4.

But what it may be asked, are those cases in which the Deft's character is put in issue? There is no definition given in the Books. From the example I should think that a Criminal Prosecution "put the Deft's character in issue" whether the meaning of the rule "when it charges a habit or course of criminal conduct, as contradistinguished from individual or specific acts". In such cases the prosecutor may attack the genl. character by proof of particular facts, not alleged in the Deau. As where one is indicted under a genl. charge of keeping a bawdy House

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although not for particular acts of misconduct, it is a charge of a course of criminal conduct, which puts the genl. character in issue. We also if one be indicted for being a Common Barrator - Long the C. S. office of being a "Common Thief", an instance of which occurred in Boston a year or two ago.

But on the other hand Forgery, Theft or Swindling does not put the genl. character in issue & the prosecutor cannot prove any other instance of Maleconduct than is alleged. Thus he cannot move the genl. reputation of the Deft. is that of a thief (the charge being of a specific act) unless deft. has introduced evi. just of his genl. reputation; & this hereafter.

VII.th But there are cases of this kind in which the prosecutor is not allowed to examine, as to particular facts without giving notice previous viz: Where a person is indicted for being a common Barrator. This rule is founded on the presumed difficulty of defending without notice - as the indictment is most usually against Lawyers, whose business it is, to carry on suits. Bull 296 - 1 McAd. 324 - 2 Cr. 7.

But in other cases where the character of the Deft. is not put in issue, the prosecutor cannot examine into the Deft's character, either in relation to particular acts or his genl. reputation, unless the Deft. himself, commences the enquiry. Bull 296 - 1 McAd. 324.

And even if the Deft. has opened an enquiry on his part by exhibiting evi. in his favour & to support his character, the prosecutor cannot examine as to particular facts not alleged, but as to the genl. character only, because it is not to be presumed, that the Deft. is prepared to meet particular charges not put in issue, without notice. 1 McAd 324 - Bull 296 - 2 Cr. 7 & Swi. 141. 8

VIII.th And in Criminal Prosecutions in which the Deft's genl. character is not put in issue, he is indulged in giving evidence in support of his genl. character. It is obvious, that such evi. on the

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part of the Deft. does go farther to prove the matter in issue than contrary evi. would on the part of the Pp. if allowed before Deft. commenced the examination. What then is the reason of the distinction? It is ^{not} founded on the strict principles of evi. but upon the benignity of the law to offenders. Pea. D. 1. W. M. 320-2. Phil. 140-141-142.

Thus if one be indicted for Theft, Forgery or Perjury, the prosecutor cannot, in the first instance impeach his character for Honesty, Integrity or Veracity.

This indulgence was originally allowed, only in favorem vite i. e. in Capital cases, but it is now extended to cases not capital, to mere misdemeanours, provided the direct object of the prosecution is to punish an offence & not merely to collect a penalty. 1 W. M. 320-1-2. 2 B. & P. 532. 306. Pea. D. Phil. 139-141-2.

But the Deft. is not thus indulged in actions on informations for mere Penalties inflicted by penal statutes; for these are not considered as purely Criminal prosecutions or direct prosecutions for crimes, but as suits to collect a sum of money; Yet if the Deft. were indicted at C. B. for the same offence he would be allowed to give in evi. his good genl. character.

Mr. Peck in his Law of Evidence says the Deft. is not allowed in Criminal cases to support his character, except in cases of prosecutions for offences which incur corporal punishment. But his authorities do not by no means support him in so genl. a resolution. And there are opinions directly opposed to it. I think his distinction fails & that the genl. Rule above given is the correct one. Pea. D. not supported by 2 B. & P. 532. Opinion of Mr. Peck. 1 W. M. 320-1-2. Phil. 140.

So also in an indictment for Rape, the prisoner may give in evi. that the woman's character before the act was notorious, & bad in point of chastity, or that he had previous intercourse with her. But he cannot prove particular instances of her illicit intercourse with other persons. The reason is that the former cases the evi. dimin-

ishes the probability of violence on his part but in the latter it goes not at all to the matter in issue. Phil. 140

VIII.th Evidence in support of the character of the Deft. in a Criminal case may be particular as well as general, i.e. a witness may assign particular instances, as reasons for his testimony in favour of his general character. 1 McClell. 322 & 4. Swi. 141. But ev. agt. his character must be general because the Deft. cannot be presumed to be prepared to answer to particular charges without notice. Bull. 276. Altho in many cases where the ev. of guilt is weak or more presumptive, proof in support of Deft's character may be very important; yet in opposition to direct & credible testimony it is of very little avail after all that has been said in relation to the admission of such ev. It may be observed however that such proof is important, not only where the ev. of guilt is weak; but when the proof on both sides is "in equilibrium." Phil. 140 - Peas. 2. Ho. R. 217.

It is a genl. Rule & applicable to all cases: That the best ev. which the nature of the case admits, must be produced, withholding this & exhibiting ev. of an inferior or secondary nature affords presumption, that the former would operate agt. the person producing the latter & therefore it is that secondary ev. is not to be admitted, when it appears there is better ev. within the power of the party. 1 McClell. 342 Peas. 2. Ho. R. 157.

Thus if a party wishes to prove the contents of a written instrument in existence & in his custody the instrument itself must be produced & it is not competent for him to prove the contents of it, either by Parol or by Copy: he must produce the instrument itself or send in his suit. 10 Co. 92 - 1 McClell. 356-7-80-2nd 460 - Peas. 8. 9. (as to Instruments lost or in the possession of the adverse party, vide post)

IX.th So also if a Deed or other Instrument is attested by a subscribing witness the execution of it, can regularly be proved by no other ev. than his. For being selected

by the parties, he is considered the best evi. or witness. This comes within
in the genl. Rule, requiring the best possible evi. in all cases (for ex-
ceptions to this rule, vide post.) Esp. 257 D. 2 Aug 205 or 216 - 4 East 53 - 2 B.
103 - Esp. cas 89. Livi 256 - Leach. C. law. 204 Sec. 9.

But the law does not require that all the evi. which
might be obtained should be produced. Hence the evi. of one
of two or more subscribing witnesses may be safe to prove the exe-
cution of an instrument. Pea. 9 - Livi. 27. D.

In genl. no precise number of wit^s is necessary in C.S.
to establish a fact. The genl. rule is, that such evi. as satisfies the
triers is safe, to support any issue; of course, one credible wit.
is all the law requires to prove any fact. This rule however is not
universal. 1 Livi 6. Car. 144. Shaw. 150 - 1 McCab. 16 - Phillips 107
Livi 142.

Thus on a prosecution for Perjury, two wit^s are necessary
to a conviction for if there is but one wit. there will be only an oath
of one person agt. that of another & at the time of taking the oath the
prisoner was as competent to testify as this wit. & he continues so
until convicted. The case is precisely the same as if both had
not upon the trial of one & the same cause & contradicted each
other so that we have only one agt. oath. And still the oath
of one wit. may be safe, to satisfy the triers, till the law from the
danger that might ensue is preremptory in requiring two. 4 Bl. 358.
10 C. 194 - 1 McCab. 37 - Phil. 107. (See whether this rule is the same by
the ancient C.S. 1 McCab. 31 - 2 Hawk. 25. 129.)

The above rule however does not absolutely require that
there should be two wit^s to the same fact, but it means (as now
understood) that there should be some independent evi. in addition
to the testimony of one wit. Phil. 100.

Xth In High Treason also & High Treason & misprision
of Treason two wit^s are required, by several English Stat^s the first of
which is that of Ed. 6. These Stat^s do not extend to every species
of Treason; as debarring the current Coin - Counterfeiting
the King's Signet &c. 4 Bl. 358 - 7 - Foster's Cr. Cas. 240 - 4 - 1 McCab. 15 to 91.

Phil 14 note. 110. That such was not the Rule at C. L. vid 2 Hawk. P.C. ch. 25- see 179- 3 Keb. 601. 1 McCut. 16-31- Phil 100. Lord Coke says it is a rule of C. L. 3 Inst. 26- But the weight of authority is against him. This may be a question of moment in some of the States where the English Stat. are not binding.

And in cases of Treason it is required by the Stat. 7. W. 3. "That both wit^s testify to the same overt act" or "that one testify to one overt act & the other to another", i.e. each testifies to an overt act otherwise the prisoner cannot be convicted except upon confession in open Court. 4 Bl. 357. 1 McCut. 21-34.

But by the Constitution of the U. S. & not only two wit^s are required but both wit^s must testify to the same overt act or there can be no conviction, except by confession in open Court. Const^t. of U. States. art. 3. sec. 3.

The requiring two wit^s in cases of Treason, extend only to overt acts of Treason: Collateral facts, i.e. facts not constituting, nor tending to prove the overt act may be established by one wit^s, like any other fact. Thus Doct. & more ^{he} was a natural born citizen, where he lived, &c. Foster. C. cas. 240- 5 State Trials. 634- 1 McCut. 34-35- 268-

And a similar rule or distinction obtains in case of Perjury. Collateral facts that do not constitute the perjury, nor go to prove it may be established by one wit^s - as the taking the oath, under which ^{the crime} is alleged to have been committed. 1 McCut. 27.

XII.th It is a rule in Chancery, founded on the same principle as that which governs in the case of perjury, that if the Def^t. answer is contradicted by one wit^s alone the Pl^{ff}. cannot have a Decree for the answer being under oath there is oath only a ^{single} oath. 1 Vern 161. 1 Ves. 66- 95 Pre. Ch. 19- 2 Paws. C. 216- Bull 205- 3 Attk 646. 2 Ves. jr. 243. 9 Ib. 202-3- 7 Ib. 66-7.

All testimony in a Court of Justice is regularly given under oath & the declaration of a Stranger, i.e. one not a party to the suit, are regularly no evi. unless they are made in Court & under the solemnity of an oath. Hence, even if a Judge, or

or Juror is acquainted with any fact in issue, he cannot
set from this knowledge, unless he is sworn & testified like any Juror.
other wrt. 1 Oth. 146- 2 ^{Mad.} Mad. 99- Pea. 10.

XII. It follows also from the same gen. principle that
"Hearsay Evidence" is in general inadmissible. By Hearsay evi.
is meant testimony by one person of what he has heard another
say - this is inadmissible for two reasons: I.st The wrt. does
not testify respecting the fact in question "directly", but he testifies
to the mere declarations of another - to declarations not made
in Court, nor under the sanction of an oath. II.nd there can
be no cross-examination as to the fact in issue, for the wrt. has
no knowledge of it independent of the depositions which he swears were
made; & this inadmissibility of cross-examination for the benefit of
the party ag^t whom such evi. would go is in gen. a suff. objec-
tion to rule out any evi. Gibb. 107- Pea. 10-11- Phil. 173- Bull 294.
3 M. 721- 2 East 27- 54- Swi. 121- Esp. 784- 1 Mad. 203.

But when the fact in question is in its nature or in
common presumption, incapable of positive & direct proof: as on ques-
tions of Custom, Prescription, & Pedigree. This exception is a
matter of necessity for the fact cannot be established & proved otherwise
than by common reputation. Bull. 235- 1 M. 303- Esp. 8. 738-
Pea. 11- Swi. 121- & Hawthorne. 3 C. 368. n. 11.

Thus on a question of Custom which can only be proved
by usage, gen. reputation may be proved by Hearsay evi. Ex. a
wrt. may state what he has heard from dead persons respecting
the reputation of the right or what was the common belief or
opinion respecting it; but not what such persons have said rel-
ative to fact, shewing the exercise of that right. They may state that
they always supposed there was such right, or what deceased per-
sons have said to confirm them in the belief of the existence of
it. Pea. 13- 1 M. 466- 5 M. 26- 31- 2 M. 512- 12 East 62- 11 East 31-
331. 3 M. 368.

XIII.th Hence on a question respecting ancient limits or boundaries, a wit. may testify what were the reputed limits formerly of the Town, or Parish, or what deceased persons have said respecting them, but not what such persons have said respecting the former existence of a Monument, Building or Wall in such a place for this would be evi. of a particular fact & not of gen. reputation ante 1 2 M. 53 - 14 East 331 note. Phil. 102. 3 - Pea. App. 4 49. Evidence of reputation, is upon the same principle admissible in questions respecting the right of way. Pea. 12 - Bull 295. So also on the decons of deceased strangers, i.e. in relation to the reputed existence of the right, but not to any specific examples of the exercise of that right - such as are cognizable by the senses. Bull. 295

So also on questions whether such a piece of land was formerly part of such an estate, the decons of a deceased Tenant are evi. as to the generally rec^d. opinion. De Ray 1734 - Phil. 102 - 2 M. 53 - Pea. 13. - 91 -

XIV.th So also the decons of deceased Parishioners, made when no dispute existed ~~there~~ may be proved to show what were reputed to be the Parish limits. Pea. 13. App. 4 33. So Entries of deceased Officers of a Township, of monies rec^d. of those of another Township or Church. rates, have been admitted to prove the liability of the latter Township, the entry having been made when no dispute existed & by persons who made themselves charge-able with the money 4 M. 1669.

So entries made by a de^d. Steward of monies rec^d. in satisfaction of Trespass done upon a waste have been deemed admissible to prove the right of soil. (Pea 12. (20d Qui?))

(But entries made by one claiming to be owner of the land, of money paid him by a tenant is no evi. of his title, even as between other parties Pea 13 - 3 M. 121. Still however it is a rule of daily practice, that decons of de^d. owners,

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Dec.

of land, restraining the limit of persons holding under them, who claim
dife, may always be given in evi. Decisions not restraining such limits can
not. This rule is founded on the principle, that a man's confes-
sions may be proved agt. himself - it extends to grantors & an-
cestors, while in possn. i.e. while owners. 5 Tr. 123.

XV.th On questions of Pedigree the genl. rule, that hear-
say evi. is not admissible is more relaxed, than upon any subject
whatever. In these cases the decisions of decd. persons, who from their
situation would be likely to know the fact in question, may be given
in evi. as facts of this kind can frequently be proved in another way. E.g.
Decisions of decd. parent upon questions of legitimacy, whether a child was
born after or before Marriage. Coep. 591. 3 Tr. 719. 6 Tr. 300. Regent.
10 East 120. Bull 112-294. Espin. 704-5. Swi. 122. Pea. 11-12-102 3. 3 Bl. 300.

But the decisions of decd. relations are admissible in those
cases only where they are supposed to have been made without any
interest or bias in the person who made them; for if he has made
a decision respecting the pedigree of an other, when there was a suit
pending, or in contemplation, of which he is or was expected to be made a
party, the decision cannot be proved. On this subject there is a contra-
dictory opinion. Some saying that such circumstances would only go
to the credibility of the Decn. The better opinion, I apprehend, is that it
goes to its competency & will exclude it. Phil. 176-7-8-9. Vin. 46.
Dec. evi. 5. B. 14 East 331. Coep. 594. Scho. 604. 3 Campb. 444. But decisions
of Parents are not admitted to prove non access during wedlock. This
is forbidden by cons. of morality policy & decency. As the Co. Parents
cannot bastardize their issue born after wedlock or marriage. Coep.
591-2. Bull 112. Phil 100. Est. 15. Swi 123-8 East 203. 11 Tr. 133. Vide Ld
"Parent & Child."

Declarations or Decisions of more ^{strangers} are inadmissible in ques-
tions of pedigree & of Decd. neighbors, as they are not supposed
to have the better knowledge. 3 Tr. 733. 11 Tr. 312. 13 Ves Jr. 147-514.
14 East 303. But it seems the decisions of decd. surgeons as to the time
of a birth he attended in his professional capacity may be given in
evi. as may also any memorandum made by him at the time &

his evi. may be of great consequence. But not so fast 100. Fin. 47
lit. evi. 5 B. 91-

Altho the decision of a stranger is not admissible in evi. of a
question of Pedegree, yet the genl. reputation of the neighborhood
or place to which one belongs is admissible "a fortiori" the general
reputation of a family, as to the Legitimacy of a child, is admissible
see 11. c.

In all these cases however, the decision of a relation can-
not be admitted, if the party who made the decision is living & can be
produced in Court. He should appear personally. So that in the above
exceptions to the genl. rule, relating to "Hearsay evi." the decisions ad-
mitted were supposed to have been made by persons dead, or in
situations not to be produced in Court. 2 Stra. 974. Bull 113-3.
Campb. 457. Phil. 176.

XVI.th But to prove the state of a family as to marriage,
births & deaths, the question of legitimacy not being involved,
the decision of any decd. person likely to know the facts & the
genl. belief of the family, is good evi. As to the question, whom
A. married? what children he had? whether he died abroad
or. Bull 294-5. Esp. 730-85. Pea. 12. 3 Ed. 368 n. 11.

And indeed for this purpose a recital in a deed - a spe-
cial verdict between members of the family, stating Pedegree -
Monumental Inscriptions - Herald Books - Family Bibles
or Records in other Books - a will made by an ancestor & un-
colled - Documents in a Bill in Chancery - Engravings on Rings
& Jewels & all Family Memorials are good evi. to prove suc-
ceed. Bull 294-5. Esp. 730. Phil 175-6. 11 East 505-13. 13 Ver. 144.
But Hearsay also may be good evi. of Pedegree. Thus of
the place of one's birth for that does not present a question of
pedegree, but a simple point of locality, & he proved like any
other ordinary fact. 8 East 579. 176. 373. 2 Hl. 27. 54 63-3 Ed. 707.
Phil 100.

In some cases a memorandum in writing made at the
time of the transaction, in question, by a decd. person in the

ordinary course of his business is with the circumstances admitted in
evi. This is not strictly Hearsay evi., as it is derived from the act
rather than the declar. of the person making it; Thus a memorandum
made by a Clerk or Agent of goods recd by the principal is good
evi. to prove the delivery. Pea. 14 Salk. 205-690- Stra. 1129.
So also, entries by a dect. Drayman, of Beer delivered for his employer
the course of business being proved to be for the Drayman to make daily
entries. Pea 14. notes So an entry in an Attorney's Book for draw-
ing a Surrender, he being dead, was admitted as evi. of a Surrender
it being corroborated by long passage. But cases of this kind turn so
much on their own peculiar circumstances that it is difficult
to lay down any work rule respecting them. For further examples vid. Bull.
202-3- Salk 245-00.

XVII.th I would observe by the way that such a memorandum
is never admitted in evi. of itself, unless the person who made it is dead.
Altho. he may be abroad, or sick, or out of the reach of process.
Phil. 194-5- 10 Cas. 1- Pea 15 note. But a memorandum or Book
entry made by a party himself, is never in itself evi. tho it may be so
in connection with concurring evi. Thus such an entry was admitted
to confirm the testimony of a wit. who swore that he saw the de-
livery & that he had seen the entry. The memorandum here cannot
evi. of the fact in question any farther than that it corroborated
the testimony in question of the wit. if the entry had not been found
his evi. would have been shaken. 10 Cas. 300. Pea 14-15- Rule
294- Shop Books are admitted in many of the States as evi. of
goods sold & delivered, or of work & labour. How far they are compe-
tent evi. vid. (Phil. 199 note (Dunkley's Edition) 21 U.S. 4. 217-569-496.
455- Swi. 81-2- 1 Day 104- 1 Dallas. 2. 230-72-205-4 16. 153- 1 Binney
234- 1 Bay. 40- 2 16. 172- 3 Tom. 16. 446- 12 16. 461.

XVIII.th In Criminal cases the Rule excluding
Hearsay evi. appears to be somewhat more strict than in
civil. But it may be admitted by "way of inducement" as
the legal phrase is, i.e. for the purpose of explaining or illustrating.

making that which is of itself proper evi., as well in the former cases, as the latter. & where a prisoner has made some declaration as to the truth of certain reports, respecting the guilt with which he has been charged & was then - a tort. in relation his conversation with the prisoner was allowed to state what the report was, that his testimony might be intelligible to the Jury. 1 W. Mel. 282-97-99-301-60. Bull. 294.

But there is an important rule, relating to Hearsay, evi. in Prosecutions for Murder or, as I presume, any species of Homicide, viz: That the depositions of the deceased, made under the apprehension of death, in relation to the commission of the offence, as accusing or exculpating some one, are admissible evi. for this situation is considered as creating a sanction equal to that of an oath. Leach. C. cas. 563-7- Stra 499-1 East. P. crown 353-11 W. Mel. 301- Swi. 124- Pea. 15-16-3 Ed. 368. n. 11.

But depositions thus made by persons legally infamous, as an attainted felon are not admissible. Indeed depositions made by a party "in extremis" are never to be admitted, unless his oath, if he were in a condition to take one in a Court of Justice, would be recd., the sanction arising from the consciousness of approaching ^{death} being only equal to an oath. Leach C. cas. 308-370- 11 W. Mel. 367- Pea. 16 Swi 125- "Port"

The depositions of persons mortally wounded, but not under the apprehension of death, are not admissible, for the sanction arising out of that apprehension is wanting. Swi. 124. 1 W. Mel. 383-5 Leach C. cas. 364-97-563.

XIX.th It is not necessary however for the purpose of making such depositions admissible, that the party making the depositions should have actually expressed any apprehension of approaching death. If it can be inferred or collected from the circumstances of the case, that he was under any such apprehension they are

evi. 1 Inst. 9. Bacon 353. 2 Sacks' C. Cas. 563- 1c 11 Inst. 303-5. Swi. 124. Evi.
3 H. 360. n. 11.

It seems, that the question whether (under) such an apprehension did ~~exist~~ exist or not, must in the first instance be decided by the Court, for the purpose of deciding whether the deans were admissible or not. If they are not admitted this decision is conclusive, but if they are admitted, the question is still open to the Jury notwithstanding the opinion of the Court, & if finally they are of opinion, that the party was not under the apprehension of death, they are not to regard the evi. at all. Sacks' C. Cas. 563-4 364-97- 1c 11 Inst. 303-6. Swi. 125.

This is analagous to the case of one declaring upon an instrument, lost or destroyed, he cannot prove by secondary evi. the contents of the instrument, until he has satisfied the Court that it is actually lost or destroyed & after the secondary evi. is admitted, if the Jury are satisfied that the instrument is not lost or destroyed, they need not regard this secondary evi. It seems then that in these cases the competency as well as the creditability of the evi. is to be determined by a Jury at the end.

The dying deans of persons dec'd are under the same limitation admitted in civil cases. Thus upon the question as to the genuineness of a man's will the deans. is a test. made on his death bed, that the testator had made a former and only genuine will, which was destroyed & that the same question was forced, was held to be good evi. 3 Burr 1244-55- 6 East 108- 1c 11 Inst. 350- Swi. 125.

So also what a dec'd person has sworn to, on a former trial between the same parties, may always be proved (deans, if the parties are diff. &) so if the present parties claim under the original parties, whether the cause of action is the same or not, is immaterial. The evi. in this case is under oath & the parties can cross-examine. 1c 11 Inst. 203. 5 Inst. 373. Swi. 125- Foster C. Cas 397- 2 Sacks. 665- Pea. 60- Her. 259- Phil. 199.

110.
And what an absconding wit. had sworn to in a
Court of equity may be proved. The prisoner if it appears
that the prisoner procured the writ. to abscond, for it is the
prisoner's own fault that the writ. is not present in person. 2
Hush 605. 11 Hush 235-6. Hush 55-10 East 373-1 Root 74.

XX.th What one of the parties in suit in relation to the mat-
ter in issue, may always be proved as to him by the other. &
Prisoner's confession is always good evidence, as to himself. 1 Hush
663- Pica. 10- Phil 71- Swi 126. Such confession of the party how-
ever is not conclusive for he may prove that the statement
made by him was incorrect. Whether it was made solely de-
sign or mistake, it cannot operate as a record between the
parties 11 B & P. 49- 10 Hush 39- Phil 74- & 10 J. Hush 279.

But when the confession of a party is then proved all that
he said at the same time on the subject is to be given in evidence. And
the more confession itself. But he is not entitled to any qualifying
deceits, he may have made at a different time, for this would be mak-
ing evidence for himself. 1 East 462- Blount 215- 1 Hush 439- Phil 79- 10-
Vincent 1 Hush 22. Cas. 10 B. 23.

And a party is never allowed to introduce evidence
as evidence for himself, except when they constitute a part of the
res gesta or matter of fact or transaction in issue, or when they
accompany an act of his own. Thus: The terms of a parcel, promise
or contract may be explained by the facts of the parties & at
the time when they entered into the very essence of the contract.

Suppose the question is, on which obligation a tender
was made. The debtor may prove, that he said at the time,
that he intended the money to be applied to obligation A & B.
But if he made no such declaration at the time, in subsequent time,
that he intended it should be applied to discharge that obligation,
it would not avail him. So where one with his sword in
his hand said if it were not "assize time" &c. This declaration was
admitted to prove, that he did not intend to strike - so in an ac-

12.
21st But the action of a stranger or even of the husband's
agent, child or wife in his absence are regularly not *eo. a. p. e.*
sine: As in the case of a Contract or Debt, if the wife in her
hands absence, ^{confesses} that he was guilty or indebted. 2 Str. 1094-6 24.
600- Luce 127- Pea. 16-17- 10 Will. 577. Esp. wife's acknowledgment
showing received wages earned by herself. 2 Str. 1094.

So in an action by husband & wife in behalf of the wife, as
Debt, her confession after marriage will not be admitted, for dur-
ing the Coverture, her right to act as Debt. is suspended. 6 Will. 600.
Dobin v. Ben. Co. Cases, no Decree. & the wife will affect the husband
- the injury is his & the action is for his benefit & she cannot then
traverse his right. 10 Will. 577- So says Judge Gault. See vide contra. Phil-
263-4 6 East 143-325p. Cas. 100. 9762

So in an action in which an aggregate Corporation is a par-
ty, the confession of an individual member of the Corporation can
not be proved as evi. for an individual in such a case is not re-
garded at all. The Corporation is the only object of the law. Phil 74. n.
3 Day 493. And the reason is obvious, for the confession was not made
in the exercise of any Corporate duty.

22nd But in transactions usually made by wives, if the
wife make a confession with the husband's authority her Decree may
be proved as evi. agt. him. Thus: where an action was brought for
nursing a child, evi. of the wife's Decree, that there was a con-
tract made & pay a certain weekly sum, was admitted. The words of
this rule appear quite good & rather too much so, for I know of
no other instance of the kind. 1 Str. 527- 125p Cas. 142- 25p 791.
Peas. Luce 127.

The Decrees of admissions from a servant or agent at the
time of transacting his principal's business & in relation to it, are
evi. agt. him - They are regarded as part of the "res gestae". Thus the
delivery of a Deed by a servant to a third person as an agent
being made with Decree by the servant at the same time & in
relation to it - Those Decrees are admissible in evi. So if a servant

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said as to the defect of an article at the time of purchase, his
decons. might be evi. agst. the Master in an action for dam. Civil.
ages. 3 M. 455. 2. M. 600-6. Phil. 41. 4-10 Ver. 42. 127.

But an acknowledgement by a servant or agent after
the time of the transaction to which it relates, is no evi. agst. the prin-
cipal, for they do not form part of the res gesta, but stand on the same
footing with Marsaut's case in genl. 7 M. 665-8. Phil. 75-7-8-
5 Esp. 74-135. 2. B. 511. 2. Humph. 555-10 Ver. 4. 127. Axi. 127. (See 10.
The same distinction holds as to the decons. of interpreters between two par-
ties & for the same reason. 11 State Trials 171. Phil. 77. For he is the neces-
sary agent of the party.

23^d The decons. of a Bankrupt as to his motives of ab-
sconding, if made at the time of absconding, are evi. in an action
prot. by his assignees to prove the act of Bankruptcy, for they
constitute a part of the "res gesta". 5 M. 512.

But the genl. rule, that the decons. of third persons can
not be given in civil, unless made at the time there is an exception
viz: In case of an action Insurance effected by the husband on
the life of his wife - here the subsequent decons. of the wife, as to
her ill state of health at the time the policy was effected is evi.
agst. the husband. This is a class of cases "ex genere" standing on
its own peculiar reasons. For frequently the existence & even the
nature of bodily complaints cannot be known but by the decons. of
the subject of them. 6 East 100. Skint. 402. Phil. 104.

For the same reason in prosecution either civil or
criminal for battery or for personal violence of any kind, the
decons. of the party injured respecting the bodily pain occasioned by it
whether at the time of the act or not if made during the suffering, are
admissible evi. & this even in an action prot. by the party him-
self, for it ascertains what the most skillful surgeons could not do
the rule appears indispensable. And if on the other hand it can be
proved, that they were made for the purpose of being in evi. on the
trial, & also admissible, they will have but little weight with the
Jury. 1 East 86. Swigt 130-1.

When the party to a suit represents or stands in the place of another person. The confessions of the latter are evi. agt. such representative. Confessions of testator are evi. agt. his ex. do of an ancestor agt. his heir when suing or when sued as heir. Chanc. 120. For as the confessions of testator &c. would have been evi. agt. himself if living, they ought to be such agt. those claiming under him.

24th also in an action agt. a Shy. for an escape on a Habeas Process, the confession of the escapee that he owed the Pl. such debt is evi. agt. the Shy. There can ordinarily be no need of such evi. in case of final process. For you will perceive, that in an action agt. the Shy. the Pl. must prove that the escapee owed him & that he should not be deprived of the benefit of the debt's confession, to that effect merely because the Shy. has interposed by his own wrong. 4 Blk. 436. Pea. cas. 65

The same rule obtains when an action is brot. agt. the Shy. for a false return by the Pl. in the suit or debt. Thus et seq. 13. in Assumpsit the Shy. returns "non est inventus" by which the Pl. is defeated of his action - an action then lies agt. the Shy. & the question is, has the Pl. sustained damages? To prove indebtedness debt's confessions, are admitted altho he is no party to the suit. Pea. cas. 65 Corp. 169. 4 Blk. 436.

And if in the case of escape above stated, the escapee were suffered by an Under Shy. his confession of the fact of escape would be evi. agt. the Shy. 2 Ray 190. Pea 17. 10. Swi. 120. The reason is that as a breacher of official duty, the Under Shy. stands in his place & so far as respects civil liability may be said to represent him. By the latest authorities, the confessions are limited to those made at the time of escape & is not extended to those made after. 1 Campb. 309. 91 note. Pea. cas. 65 10 Johns. 470. Phil. 76.

In an action by the assignees of a Bankrupt his acknowledgments before the act of Bankruptcy that he was indebted to the petitioning creditor is good evi. in support of the

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commission; since his confession would have been good to obtain
the commission & the assignees represent him. *Pest. Cas 168* — *Cvi.*
Pea 13 Q. 65.

On the same principle on a *Sci. Fa.* agt. a garnish-
or he may prove the debt of the absconding debtor, that gar-
nisher owed him nothing. Foreign Attachment is regulated in
England by custom & in the several States in the *Union*. *Sidi.*
129 — Thus where a party to a suit, justifies in an action of trespass
under the title & by the order of B — B's dectous, that he did not know
the premises are *cvi.* agt. &.

2^d It is a general rule that when there are several depts.
to a suit, the dectous of one will be *cvi.* agt. himself only & not agt.
his Co-Depts. for one man cannot convey away the right of another.
Accepting 10 - Bull 243 - 11 W. 40 - 269 - Sidi 128 - 32 - Barnes 317.

Hence in an action agt. one of two joint & several ob-
ligors, promisors &c, the confession of the other is not admissible
to prove the execution of the contract or instrument. His con-
fession cannot prove the transaction out of which the debt li-
ability arises. *Sidi 62 - 174 - 203.*

But there is an exception to this rule, in the case of
Partners in Trade. If one is sued alone for a company debt &
does not defeat the action by a Plea of Non-joinder in state-
ment, but suffers the action to go down to trial on the merits
of it, the confession of the other partner, tho' not a party to the
record may be given in *cvi.* the partnership being provi-
ously proved, for each Co. partner is the agent for both &
the act of either is the act of both — of course, the acknowledgment
of either operates agt. both. *Pea. Cas. 16. 203 - Chitty on Bills 209 - 210.*
51 Phil. 72 - 3 - 11 W. 40 589 - 12 W. 40 169 note.

And this rule has been carried so far as to allow the ac-
knowledgment of one Partner, tho' not sued himself, to be given
in *cvi.* agt. the other, tho' it was made after the dissolution of Part-
nership. *Phil. 73 - 1 Tuntor 104. Contra 3 Johnson & York 2. 536.*

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This I think is carrying the rule very far. The ground state-
ment, that even after the dissolution of the genl. partnership as to
all previous contracts the Partnership still remains.

And tho the confession of one of two joint several obli-
gors, is not evi. in an action agst. the other to prove the con-
tract, yet the contract being established, such confession may
be proved agst. the other to take the case out of the statute or for
any other purpose, except to prove the execution of the note.
Be. For in this case they are quodammodo partners. Besides the
confession in legal effect is not strictly a decon., but a fact or
act, that has the effect of a new promise, or a ratification of
the old one (Semb.). 3 Day 349. Doug 629. 652. - Richard v. Whitby,
Pea. cas. 15. 202. - Phil. 72. 3. 6 John. 267. See ante 20.

This rule however does not hold for prosecutions for Crimes,
or Tort, & is not in terms predicable of either. The confession of one
does not prove the other guilty; if it were admitted, it would be per-
mitting one to subject another for his own wrong & therefore it is
wholly inadmissible.

But here it is to be particularly noted, that in the case of an
illegal combination, the combination being proved the decon.
of one made at the time of doing the illegal act, as to the notice of do-
ing it, is evi. agst. himself & the others also, as in case of a Riot,
when the combination is established, an Union or concert of plan is
so proved & a decon. made at the time is a part of the "res gesta"; it is
then the intention of all, as declared by one & will be evi. agst.
all, unless the others oppose it at the time. But a decon. made
afterward is not evi. agst. any one but him who made it. 6 MS 27
& Phil 73-4.

26th If one of two debts in an action suffer a default
& the other pleads to issue, the decon. of the former may be proved at the
trial of the issue for the purpose of showing the amount of damages
for the verdict ascertain the damage agst. both. So that as to that point
both are on trial. The default is mere confession of guilt. If both are

subjected, there can be no one assessment of damages. So that this is the only way in which the plf. can avail himself, of the confession, *see* 118. The confessor himself, *Kirb. 18. 2 Hawk. 604-7-11 McEl. 42-361 Phil 71. St. Poa. 19 Swi 120-390- Deach 287 319.*

And it seems now to be settled, that proof of Def's confession uncorroborated by any other evi. whatever may warrant a Jury in finding him guilty even of a Capital Offence, *"Shin Secus" 11 McEl. 51 272- Foster's C. Cas 243- Deach. C. Cas. 39-Swi. 132.*

But a confession out of court extorted by torture, or by violence of any kind, or by threats, or inducement, or by promise of pardon, or favour is not admissible in any case; for that would be putting the prisoner at the mercy of the violent, the crafty & the designing. *2 Hals P.C. 200- 2 Hawk 204-11 11 McEl. 42 4- Deach 122-126- 240- Poa. 19. 20-Swi 131-2-*

27th. And hence a confession made out of court by a prisoner in expectation of becoming a wit. & being admitted a wit for the King or Public, is not admissible evi. For otherwise prisoners would be exposed to extreme hazards - some might be to avoid the danger of a trial. Indeed the humanity of the law will not allow evi. to be admitted in such cases whether it ^{be} founded by fraud flattery or violence. *Deach. 636- Swi. 132.*

On the other hand the discovery of a material fact, resulting from a confession thus made is good evi. unless obtained by fraud flattery or violence so that the confession itself, could not be admitted. Thus, if one is charged with Theft & is induced in any manner to confess his guilt & tell where the stolen goods are, if they should be found there, the discovery & consequent finding would be admissible evi. agt. him. *11 McEl. 47 & Poa. 20- Deach C. Cas 299-301- Swi. 132-*

In England the examination of a Prisoner before a Magistrate & put down in writing is evi. agt. him in felony under the Stat. of 18th P. 11. 2 Hawk 604-5-11 McEl. 379-204. 312.

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I observed, that the confessions of a party may not be
promissory - but there is a distinction. One should be
treated the confession of a party, & an offer of compromise made
by him, for the latter can never be taken in evidence. Thus
if a man threatened with a suit for a £100 - perhaps he would pay
for having £20. to the trouble & expense of going to court. However
even if he were certain of a recovery, he might offer it were
he a man of delicate feelings to avoid contention as well as
the trouble & expense. Lord Mansfield says "a man must be per-
mitted to buy his Peace, without prejudice to his cause." Offer of
such an offer is irrelevant. 1 Esp. Cas. 143 - Chitty B. 208 - Bull.
236 - Phil. 1019 - Pea. 10 - Swi. 126.

20.th But the confession of any material fact during a
treaty for a compromise is evidence against the party making it. Pea.
19 - 1 Esp. Cas. 143 - 2 Ab. 275 - 3 Ab. 113 - Bull. 236 - Pea. cas. 5.

In some cases the acts of the party amount to an admis-
sion, which is conclusive upon him; which he cannot re-
tract or contradict. Thus if one acts as a Junkeper & he is sued
or prosecuted as such, he cannot deny that he was lawfully
an Junkeper, for as he holds himself out in that character to
avail himself of the benefit of it, he shall not avoid the du-
ties & liabilities of it. This is policy for otherwise the people might
be defrauded. The same is true whatever character a man may
assume. 3 Tolle. 635 note 7 - Pea. 20 - Swi. 129.

So if a man lives with a woman as his wife when she is
not so, she may bind him by contracts as a lawful wife may do,
his acts amounting to an admission that she is his lawful wife.
Pea. 20. 2 Esp. Cas. 637 - Swi. 129 - Vid. Tit. Husband & Wife.

21.th So also in some cases if one treats with another
holding a particular situation, & thus derives a benefit to himself,
he is not permitted afterwards to deny the fact. B. & C. A. rented
the lands of B. the incumbent. In an action for Use & Occupa-
tion, A was not permitted to dispute B's title by proof of Simony. Pea. 21.

Partnership. 1.

1. Assignees

: By Bank^t part^r put in court with other s.g.

2. Attachment

of part^r p goods by cred^r of one part^r not
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3. Bankruptcy. (vid Dissolution.)

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if such part^r give note in lieu of money
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5. Creditors. (vid Attachment.)

6. Dissolution. (vid Partnership)

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7. Executor, etc.

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2. *peruviana* (Lamour.)
1895. 29. 1. 1895.

— *peruviana* (Lamour.)
1895. 29. 1. 1895.

— *peruviana* (Lamour.)
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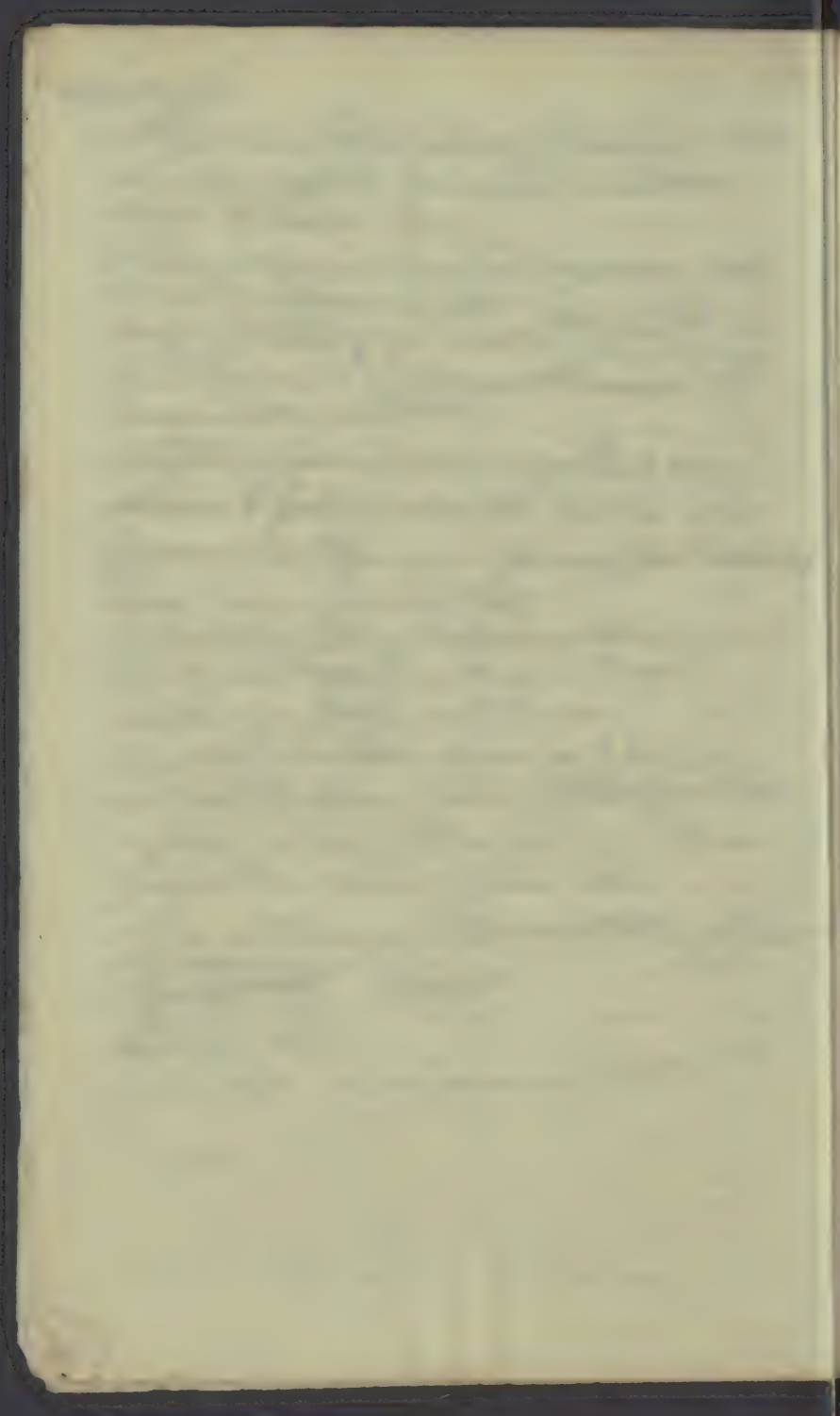
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1 St. Rep. 4. 3 St. 635 5 St. 4 2 St. 160.

Seci.

All Evidence may be considered as direct or presumptive. Direct Evi. goes immediately to prove the point in issue. Presumptive Evi. in law, is an inference from certain facts, proved or admitted of the existence of some other fact or facts. Swi. 136 - Presumptive evi. then is that which conduces to prove, consequentially, the particular facts directly, proving another. Thus if on a charge of Theft one says he saw A. clandestinely take the goods of B. this is direct evi. - but if he testifies that he saw it in possession of the goods that were stolen, it is presumptive that A. stole the goods & throws the Onus probandi the contrary on A. but this presumption may be rebutted. 1 H. R. 6 - Swi. 136 - Co. 21 - So previous threats of injuries &c.

30.th Long undisputed enjoyment of possⁿ of any right or property, affords a presumption that it had a legal foundation & in such cases even records may be presumed to have existed. The fact the presumed is submitted under the direction of the Court to the Jury. This rule of evi. is of great importance. Dr. Hantsfield said that the Court will direct the Jury to presume any & every thing for quieting possⁿ of long standing, even tho' they cannot believe, that there was any legal commencement of possⁿ. There in a question as to the right of collecting post duties, a Charter from the Crown, even, was presumed by direction of the Court & this was affirmed in the R. B. There have been very strong cases in Ct. In Ditchfield a D.D. & Record were presumed. & have existed & last, tho' the Record on which the did must have been recorded, before & after that time, were in existence. In a New Haven, the whole course of proceedings on an Intestate's estate, in a Court of Probate, was presumed; 12 Co. 5 - Co. p. 103 - 216-17 - 1 St. 399 - Esp. 636 - 3 H. R. 399 - Co. 21.

This rule I observe is founded & has for its object, "the quieting of titles under possⁿ of long standing". There is a case, where the Court directed the Jury to presume a Common recovery suffered

by a tenant in Tail. 3 M. 159-2 Burr. 1065. So where one Tenant in Common had been in exclusive possession for 36 years, the court directed the Jury to presume an actual ouster of the other that the Stat. might run. 3 M. on M. R. 399. Corp. 217.

31.st And not only ordinary facts but deeds, ratebills, Records, advertisements in newspapers, or any other fact necessary to consummate a title may be presumed. 3 M. on M. R. 399-

And it seems that an undisturbed enjoyment or possession of property, &c. for 20 years or 15 in Ct. may in analogy to the Stat. of Limitations be left to the Jury on the ground of presumption. So holden in a case (obiter) for obstructing lights of 20 years enjoyment. Rep 636. On the same principle where a Bond has lain dormant for 20 years without payment of principal or interest & without suit. The Court will direct the Jury to presume payment, unless indeed the obligee can account for the delay by absence, sickness, or gifts previous in solemnity or proof of a recognition of the debt within that time. And now the Rule is laid down in more definite language for 10 or 20 years. 1 Bl R 522-3 Pk. 395-7- 8 Mod 270- Burr 434-1963. 1 M. 270. Pea 24- Loe. 138 Corp 216. This lapse of time throws the onus on the pty. 2 Stra 226 5 D Ray 376 3 M. 10. P. cas. 535. Seem if the obligee can assign a reason for the delay. (Pea 24 note Corp 214- R. if he can prove a recognition of the debt within the time by payment of interest &c. Pea 24 note 2 Stra 226- 5 D Ray 1370. The presumption does not arise in such cases, vid ante.

And an endorsement by the obligee, if made before the time when the presumption might have arisen is good ev. of full payment. Pea 24n- 2 Stra 226 5 D Ray 1370- 3 M. 10. P. cas 535. Seem, if made after that time. Pea 25n 2 Stra 227.

32.nd If a creditor entitled to a debt payable by instal-

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ments gives a receipt for one instalment it furnishes strong pre-
sumption, that the preceding instalments have been paid - So
is the rule as to the payment of Rent. Pea 21, note. 2 Stra 896 -
10 Ray 1370. 3 Bro P.C. 535 - 3 Bl. 371 - Cowp 103 - 1 M. 299 -

And mere length of time short of the period of the Stat. of Limitations (in cases to which Stat. extends) is not suff. ground for pre-
suming the extinguishment of a right Cowp 274 Pea 24 note.

Evidence is of Two Kinds viz: I.st Written
II.nd Unwritten or Parol.

Written Evidence is divided into three kinds viz:
I.st Records: II.nd Public Writings or Documents which are not
Records: III.rd Private Writings. Pea 26. Sec. 1.

A Record is a written memorial of the laws of the
State or Nation, or a Precedent of justice according to the laws of the
State - Hence the written memorials of the act of the Legislature
& of Judges & Judicial proceedings of Courts of Record, are
denominated Records. As Parliament Rolls &c. Gibb. 7-40
Bull 291 35 - Pea 59 Sec. 2.

A Record can never be contradicted for in the language
of Dr. Coke "it imports absolute & uncontrollable verity". This rule
is founded on the great solemnity of such writing. Bull 228 Pea 27.
This does not mean, that any thing in the form of a Record, which may
be introduced, cannot be contradicted, for if a Record is made or
renewed by any unauthorized alteration, that fact may be pro-
ved by parol evi.; it may be proved to be forgery & therefore it is
no Record.

On the contrary, evi. is never admitted to prove an
alteration, by proper authority, for the purpose of correcting the
Record, was improperly made. 1 Bl. R. 664 4 Burr 2267 Pea.
202 2 Stra 210 And doubtless evi. may be admitted to prove, that
a writing, importing to be a Record, is a mere forgery - this is
not denying or falsifying the Record. Notwithstanding the gen.

rule, the fictitious date in it issued, in vacation may be contradicted & the time of issuing thereof proved by parol, when it becomes necessary for the purposes of justice; the writs, issued also in vacation are usually treated, as at the preceding term, & so if since that time before the actual issue of the writ, a tender has been made, or the Stat. of Limitations has barred the action, the Court may prove the true time, that the writ actually issued, to take advantage of that circumstance - It being a general rule that all fictitious of law may be contradicted for the purposes of justice. 2 Burr 400 - 3 B. 1241 - 2 B. 27.

As Records are thus the precedent or memorial of the laws to which all persons have a right of access, they cannot be removed from place for private purposes - Hence their existence & contents are provable by copies - these being the best secondary evi. The originals are public property & public convenience requires them to be kept stationary in a Public Office. Gilb. 8 - Bull 225. 6 - 2 B. 20 - And it is a general rule, that where any writing of a public nature which is produced itself would be evi. (intrinsic) a copy of it duly proved is also evi. 3 B. 154 - Doug 572 - 11 C. 241. 200. 2 B. 91.

But on the other hand a copy of a copy is no evi. at all, for the first copy not being produced is not sworn to & the second cannot at most be of higher credit, than the first. 2 B. 154 11 C. 241. 356. 3 B. 154.

The Public acts of the Legislature require notice of a new kind, for being the laws of the land, they are supposed to be known by all persons & especially by the Judges, who are bound ex officio to notice them. The printed Stat. Book is not evi. but is used more by in aid of the memory of those who read & hear - As to the Stat. of a Foreign Legislature, the rule is diff. Gilb. 10. Bull 222. 5. 2 B. 272. 2.

But private Stat. not being a branch of the great law of the land are not supposed to be known to the Public nor even to the Court,

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Evi.

hence they are like proved as facts, like other records which relate to private right, i.e. by copy as much as by a deed or will. *Gillb. 12-13 - Dyer 234 - 10c Mod 126. Bull 222 - Pea. 27.* And the printed Stat. Book is no evi. of private Stat. printed with it, once held on contract by C.D. Parker *Gillb. 13 - Dyer 472* - since denied (see last) & the reason why it is not evi. is, that it is no more than a private unauthorised copy, not verified by oath or any official sanction. *Pea. 27. Bull 223.*

But, if the Legislature declares, that a Stat., which is in its nature private, should be Public deemed the Stat. Book is suff. evi. of it, or rather there is no need of proof, the Judge being bound to notice it officially as a fact. *Pea. 27.*

I want repeat, that as Records are not removeable they must be proved by Copies. *Pea. 28-96 - Swi. 2.* The Copies of the Records of the Legislature are like certified by the Secy of State, as in the case of a private Stat. - The Record of the Courts of Justice by the proper officer of those courts, as by the Clerk or Prothonotary, if there is one, if not by the Judge himself. In both cases the Copy is like authenticated by the Seal of the Court, if there is one (The Just. speak in Ct., having no Clerk or seal, sign certificate without seal themselves) And Courts are presumed to know the seal of Legislature & of the several Courts of all the States of the Union, however the fact may be. *Swi. 7. 7c Stat. U.S. 153.* For analogous cases in England, *vid. Gillb. 19 - 1 Sid 467 - Pea. 201.*

Copies of Records, under seal are called Exemplifications and it is a rule of Ct., that seals of public credit are full evi. in & of themselves without oath or authentication of any other kind. If they were not Courts, would be forced to resort to another ^{lower} species of evi. - A Court of Justice speaks only by its record & the genuineness of that record can appear only by its seal, which is the established symbol by which one court certifies another. *10c Mod 125 6 - Phil - Gillb. 19 - How 411^a Hard: 110, 119 1 Sid 146.*

As to the manner of certifying records from one of the U. States to another; the Stat. of the United States directs that if an Exemplification be attested by a Clerk of the Court, it shall be evi.

in another State, provided it be accompanied with the certificate of the Chief or Presiding Justice - the Governor, Sec'y of State or Chancellor that the attestation is in due form & made by the proper Officer. 7 Stat. of N. State, 153. By the same law Copies of Records or Office Books, as they are called, kept in an Office not appertaining to a Court of Justice - as Town or County Records of lands &c. are to be attested by the Keeper of the Office under the Seal of the Office, if there is one & certified by the Gov't Sec'y of State &c. as *supra*. - *Id.* post 444.5.

Copies of the Records of Courts of Justice are of four kinds. (usually divided into Three.) 1st Exemplifications under the great Seal (kept by the Chancellor in England). Under our Law Copies are not exemplified by the great Seal of Ct. to which the record belongs. 2nd Exemplifications under the Seal of the Court to which the record belongs. 3rd Office Copies, i.e. Copies certified by the attestation of an Officer appointed for that purpose but not under seal. 4th Sworn Copies, these are Copies compared with the original by a tort. sworn to by him in Court. *Gill* 212. *Pea* 209 Bull 220.

Copies under the great seal are deemed records themselves, not Copies from their great solemnity; & these in England are the only admissible evi. of the existence of a record, upon the plea of "Nul tiel Record" pleaded in a Court of equal or inferior degree of jurisdiction, to the one whose record is in question - if a Superior jurisdiction, the record & proceedings may be removed by "Certiorari" for other purposes other Copies may be kept. *Flow* 411. *Gill* 14-19. *Term* 110. *Pea* 209. *Swi* 2.

Exemplifications under the great seal, as to Records of Courts, being unknown here, those certified by the Seal of the Court are the highest evi. in our Courts, & are regularly the only admissible evi. on an issue of "Nul tiel Record". This rule however, you will perceive, applies only to those cases in which the existence of a Record is in question, in another Court than that to which the Record belongs. *Swi* 2. Bull 226. *Pea* 209-30.

Cov.

For if a Record of the same Court in which the issue of "Null tiel record" is joined, is denied, the Court will inspect the original - So there is no need of a Copy. The cov. is in the hands of the Court. Hence the replication, affirming the existence of the record, makes no request of exemplification, but prays the Court to inspect the Record. *Pea 29.*

And if issue is "null tiel Record", it must always conclude to the Court, for it involves matter of law which the Jury are incapable of determining. *Pawer on Neg. App. 4*

But when a Record is only matter of inducement to an action or defence null tiel Record cannot be pleaded to it, for matter of inducement is not issuable *Bull 230 - Gibb. 26 - 1 Sid 145-6, Pawer 46 - Swi. 2 - 4 Bac 60-61.*

In such cases the issue being tried by the Jury the cov. of the existence of the Record is to be submitted to them & a sworn Copy as well as an Exemplification is admissible. *Bull 230 - Pea 29 - Swi. 2 - Gibb. 26 - 2 East 473.*

In Debt on Adopt. "Null tiel Record", is the gen. issue & it puts the existence of the Record directly in question, & no cov. is admitted but an exemplification under the great Seal in England, or the Record produced itself for inspection, or an Exemplification under the Seal of that Court in question, in the U. S. States.

Suppose Debt. in Trespassment pleads "general issue" which in England is "not guilty" - In Pl. "no wrong, no dissuain" & claims under a Just. of Court; here the record is more matter of inducement, for the issue is the gist of the action & a sworn Copy here, is good cov. - But a Copy or a Sworn Copy is no cov. at all either to the Jury or Court, however it may be authenticated for reasons before given. *Pea 29.*

Office Copies are grantable only by an officer appointed by law for that purpose - A Copy thus granted is of itself cov. & is of course rec'd without any collateral proof - *Gibb 23 - Plow. 110 - Rule 229 - Pa. 31-2-3.* But a Copy certified by an officer not entrusted by law to certify it, is of no credit it does not prove itself & of course

is no evi. unless examined & sworn to when it becomes a sworn copy.
Gillb. 23. 4. 5- Bull 229-

But tho' a record is in genl. provable only by a copy of some kind, yet if it can be clearly proved, that a Record, once existing, has been destroyed or lost without any fault of the party under it, inferior evi. of its contents is admissible, especially if the record is only inducement. 1 Ven 257. Gillb 22- Salk 235- 1 Mod 117- Bull. 229- Rea. 49- Hard 432. And in such case a Copy, if there is one, tho' not exemplified nor sworn to be true, is admissible, it being proved by some kind of evi. to be of the contents of the record substantially a true copy. This is allowed from the necessity of the case. Pl. auth 8 & Phil 241.

But this inferior species of evi. is admitted only in those cases, in which ancient Records or those of long standing are lost. Rea. 30. Gillb. 22. 2- 1 Mod 117. For if a recent record is lost & its contents can be ascertained, the Court will permit one to be made "de novo" 2 Burr: 422- Phil 292 Caine 16496- Gill 22. 3 Rea 30- 1 Mod 117-

Generally an Exemplification or Copy of a Record must be the admissible evi., be of the whole & not of any part exclusively. For a detached part may have a diff. construction & effect from the import of whole & the rule is the same as to Copies & other instrument as Deeds, Wills &c. Gillb 17- 23- 3 Inst. 173- Bull 227- Phil. 240.

For & agst whom a Record in a Civil suit is Evi.?
In general a Record of a Civil Suit is evi. only as between the same parties & their privies. Thus a verdict between A & B, is no evi. between C & D. Rob. Rea. 36. 8- 64- Bull 232- Car 225. 7 TR 112- 11 Mc. Val. 624- Ray 730- Hard. 462- Phil 222.

This rule requires some explanation - as who are meant as Privies? There are many kinds mentioned in the Books, but there are (semb.) only 4 Legitimate. 1st Priority in blood as between ancestor & heir at law. 1 Inst. 3- or 252- 2 or 3 East 353. 2nd Priority in estate as between lessor & lessee - lessor & lessee - jointenants & dift. remainder men by the same deed,

particular Tenant & Remainder men &c. 1 Anst. 196-169^a-352 & Bull
232. Gilb. M. 10 Co. 92 3 H. 23. Pea 29 30-1 Anst. 267.

3rd Priority in Law as between Lord & Tenant (some-
times called priority in Tenure) as an action between A & B.
If A dies, his widow is tenant in Law with B. 4 Co. 24^a. Wife &
Tenant by the Curtesy. 1 Anst. 352-3 & 353.

4th Priority in Representation, as between Testator & heir-
at-law & heir 4 Co. 23-4. Thus if there were a record between A & B
ascertaining title & B should sell to C. This record would be good
evi. in a dispute between A & C. respecting the land. If B. had
leased to C. or C. held as heir of B. or as tenant in Law or by the
Curtesy &c. In all these cases the record would have the same effect, i.e.
it would have had in a subsequent action between the original
parties.

The next enquiry is, as to the effect of the record of one
action when admitted in another between the same parties & their
privies. It is an established rule, that the Judgt. of a Court hav-
ing competent jurisdiction, directly upon the point in question,
is conclusive evi. for or agt. the same parties & their privies.
Thus if A sues B in debt on bond & B defeats him afterwards & sues
B's debt. The record of the former Judgt. may be pleaded in Bar. So if
A's debt. sues a second time. 6 Co. 7-2 Bl. R. 287- Cro. E. 668-2
W. 169-1 Lev. 235-Amb. 761-Pea. 34-5-6-4 Bac 116. Livi. 9-
Phillips Poi. 223.

Again if final Judgt. has been given on a suit it can
not be impeached, or called in question only "by due course of law"
as by writ of Error or Bill in Chancery directly praying for relief, or
as in Ct. by petition for new Trial or by Appeal, which first is pe-
tition for new Trial, is unknown by the C. &c. A final Judgt. then
cannot be impeached in any Collateral way, i.e. by any orig-
inal action. Pea. 36- Lev. 9-10-1 Day 170.

The reason for this last rule is, that a final Judgt. defining
any legal right must determine the controversy, or litigation would
be endless. The rules are the same as to decrees in Chancery & Awards by
Arbitrators, for they are considered in the nature of Judgt. Pea. 60-75-1 Day 130-3 H. 30.

If then Judgt. has been given to the deft. on a demur-
 rer or on a plea to the action or in any way, so that the right is
 determined or decided, the plff. cannot afterwards, whilst that Judgt.
 remains ⁱⁿ impeached, maintain any similar or concurrent action
 for the same cause, where deft. actions would lie for the same offence.
 the form of the action shall not make any change in the right of the
 parties. Thus when ^{groups are} forcible taking, Trepass & Trower are con-
 current actions & if sold by Indebtedness, it is for the amount
 of the sale is concurrent with them. Now if a final Judgt. de-
 termining the Plff's right be rendered in either of these actions,
 it is an absolute bar to any other action for the same thing. 3
 Wils 240-304-2 Bl. 11. 827-3 East 346-52-3-6 Co. 7-6 Mod. 20. Pea-
 34-6-4 Bac 116.

But this rule does ^{not} hold, when the first action fails thro' mis-
 conception of a remedy or for the want of an essential ~~allegation~~
 allegation, supplied in the second; for in such a case the right,
 claimed in the second neither could nor was decided in the first;
 the grounds disclosed in the ~~two~~ two being diff. ; of course the
 plff. may traverse the averment, which the deft. in pleading the
 record of the former Judgt. must make, that the cause of action
 in the second suit is the same, as was the first. E.g. The plff. omit
 to allege conversion in Trower or Malice in Slander, he may
 bring a second action supplying the necessary allegations 2 Ven.
 169-4 Bac 116-17- Cro. E. 667-8- Ray 472-2 Mod 318-3 Bl. 1-2. Pea
 37- Swi. 11.

And on the contrary, a Judgt. for the Plff. in an action of
 Debt or other demand is conclusive of the existence of that debt
 or demand agt the Deft. & his representatives cannot sue nor
 himself. the saying, unless the Judgt. is reversed by due course of
 law & the rule is the same whether the verdict be by Confession
 demurrer or default. 7 Wils 269- Bull 230-1 Day 170-34-5- Swi. 910-
 Phil. 220-9 John. 232.

And the same rules hold in Decrees of Chancery & Awards
 of arbitration, Pea. 68-75-1 Day 130-3 Bl. 30

There is one case *Hassell v. W. Farland* in 2 Burr 1009

21.
Cvi.

that seems to impugn this rule. But I think it does not come under this rule, because it was decided on diff. ground. That action was bro't to recover money back, paid under a Court of conscience & maintained, that that court could not take cognizance of a scilicet legal difference pleaded by the plf. so that the plf. in the first action could not conscientiously retain the money so paid. But even if this case does come under this rule it has been so much shaken by subsequent decisions, that it cannot now be considered as law Phil. 225. And it has been determined that if a party on being sued, pays the money, tho' at the same time, denying, that he owed such debt, he cannot afterwards recover it back, because it is said, that the payment was made in the course of legal proceedings. I doubt however the correctness of the ground of that decision. Esp. cas. 84 - 279 - Pea 35.

On the other hand, a plf. having recovered Judgt. for a part of his demand, when he attempted to prove his right to the whole, is precluded from maintaining another action for the remainder, for it is substantially a Judgt. in favour of the debt. as to that part; the plf. failed to recover.

If however the plf. did not attempt to prove but one part, as one "item", with his demand, the amount of which is immaterial, was large enough to cover the whole, he may bring another action to recover the remainder or other item for the question as to that was never raised, never put in issue. 6 Co 607 - Phil. 225.

I observed yesterday, that a final ^{Judgt. in an} action was conclusive so as to bar any concurrent action for the same cause. But in the application of this rule, there is a diversity, to be noted, between real & personal actions. All personal actions are of equal degree, of course a Judgt. in one personal action can be pleaded in bar, by way of estoppel to any subsequent personal action for the same thing. Thus if Trespass & trover be Concorded. A brings Trespass ag't B. & it is defeated. Then brings trover for the same thing, the former Judgt. may be pleaded in bar by Def. & estopp him. 6 Co 7. - Phil. 225.

In Real actions on the other hand there are various degrees some being of a higher degree or rank than others - Hence a Judgt. in a personal action is no bar to a Real one tho' relating to the same subject. Thus, if I sue B in Trespass quare clausum fregit, & B recovers Judgt., this is no bar to a subsequent real action to recover the land; for the right in question in the two actions are not the same, which I observed was absolutely necessary for a former Judgt. to be a bar for to a second suit, both suits must be for the same cause.

Nor is a Judgt. in one Real action a bar to one of a higher nature, for the same cause. B. A. is defeated in Ejectment; it is no bar to his bringing a subsequent real action, for his recovery in this action is perfectly consistent with B's recovery in the former action. 3 East 258 g.

But in every species of action, a final Judgt. so far as respect the immediate matter in issue, is a bar to any future action or litigation. 3 East 357.

Hence if any precise facts are put in issue (as that "I d. died seized") & found in a personal action, as trespass it is conclusive of that fact so as to prevent its being disputed afterwards, between the same parties even in a Real action 3 East 346-54-5-8-66 - Swi. 12.

The amount then of this intricate distinction is, that a final Judgt. in a personal action, as Trespass is no bar to a real one between the same parties respecting the same land, because one relates to the past, the other to the free hold. But if any precise fact is put directly in issue in the personal action, the record is conclusive evi. in any subsequent action as to that fact Phil. 236. 7.

To make a Record of a former suit conclusive upon any matter of dispute, it must appear from the Record itself, that the same right was directly put in issue in the former suit. Thus, when it appears, that the same point now in issue was decided by the Jt's defect in a suit upon a Contract or for Trespass,

the first Judgt. is conclusive by way of estoppel. But unless this appears from the Record no other evi. can be admitted, to show, that a particular matter, not in issue upon the record, came in question, or was taken into cons. by the Jurg. Phil. 236. 12 Esp. 46. 43. 2 Johnson 24

It is however admissible to show by extraneous proof, that the subject in controversy was the same or not. Thus if a man is in trespass, for a horse & is defeated & afterwards sues in Trover for taking a horse, it is competent for the Deft. to prove, that the horse is the same for which the former action for trespass was brought, or for the Plf. to prove, that it is not the same horse. This must necessarily be proved for it cannot appear from the record - One description may answer for 20 Horses. 32 Est 346-54-5-8-66-

It must appear from the record whether a given point or question of right was in issue - but whether it related to the same or a diff. subject or article, must appear (*aliunde*), (or by intrinsic evi.) To revert then to the case of the Horse. If it is admitted or proved to be the same Horse, the former Judgt. is a conclusive bar to the latter action. The record showing the question disputed to be the same. *vid. Id. "Record"*

I observed to make a record conclusive it must appear from the face of it, that the same point or right came directly in issue in the former suit. But a suit for performing work unskilfully, the record of a former suit in which the deft. had recovered of the plf. compensation for the labour done, is not conclusive, or any evi. that ever. The reason is, that the Plea in the former action having been the genl. issue it does not appear, that unskilfulness of performance was used as a defence, altho it might have been so used. 12 Esp. 43. 2 John. 24. *Id. 12.*

A former Judgt. between the same parties is conclusive as well when the point decided by it, comes afterwards incidentally in question, as when it forms the ground of action or defence in a subsequent suit. Thus in an action on a Policy of Insurance, with warranty of neutrality - a sentence of the Court of Admiralty condemning the vessel as enemies' property, is conclusive that she was not

neutral tho the question of legitimacy arose incidentally on the trial of the action on the Policy. Bull. 244 - 726 523 - 556 146 434 2nd 260 473 - 2nd 554 - Phil 254 - 3 B & P 201

If in an action & subject, the question of the legitimacy of the M. should arise, who sues as heir at law, a prior sentence by the Ecclesiastical Court deciding the marriage of the parents to have been good, is of conclusive effect. Their persons & his legitimacy, as to throw the onus of proving the contrary on the other party.

But in the contrary a prior judgment is no evidence of a matter which came in collaterally. To make it evidence, it must come in directly in issue. Hob. 53 - Bull 233-44.

A brings an action, against B for the support of his right produce C, a lord, who is proved legally infamous & thus C is excluded & C is defeated. A brings another action, immaterial, whether of the same kind or not, & produces the same lord, now the record of the former suit which excluded him, does not disclose the ground of his exclusion, or why if he is at all, legally infamous & therefore that record alone will not be sufficient to exclude him in this case - that point came in collaterally. Per 76-

And a judgment of a Court upon a point, not incidentally cognizable by it, is no evidence in another action between the same parties. Thus, where a question of Admiralty jurisdiction arises at or in a Common Law Court - as of Contraband or Contraband in an action on a Policy of Insurance, the judgment is no evidence in a subsequent action. It does not appear from the record or upon it that the question arose incidentally. The general issue being supposed to be a better plea. If however it were specially pleaded & distinctly proved it would come under a former rule.

The rule is the same as to any matter merely inadmissible by argument from the former judgment. Thus C sues B on Contract - B pleads Infancy or gives it in evidence under the general issue. It is not competent for C to show the record of a former recovery against B to prove that he was legally capable of making a contract to rebut his plea.

Civ.

And a prior Judgt. given upon the gen. issue is in no case whatever conclusive evi. between the parties unless the cause of action is the same in both cases, even tho' the title, out of which the cause of action arises is the same. Thus if suer B. got a given nuisance - if Jt. has actually recovered agt. B. in a former action for the same nuisance tho' every continuance ^{of the nuisance} is a repetition of the injury, the former Judgt. is not evi. because the cause of action is not the same tho' the title out of which it arises may be same. So in a second action for a disturbance of the same right or franchise. Pea. 37-D. Bull. 232-3 least 365.

The same rule holds in relation to the English action of Ejectmt. & in those States where that action is after the English method. As if suer B. in the name of a fictitious person & such he may sue again in the name of another fictitious person & the record of the former suit will not identify the parties or cause of action. *Runningtons Eje. 12* - Pea 37-D.

But in these three latter cases as well as all similar ones, the verdict in the first action is evi. in the second, tho' not conclusive. Bull 232 - Gilb. 29-30-5 - Stra 300-1151. Carth. 79-101 - The Judgt. then is not conclusive unless the cause of action is the same as well as the title, but the verdict may be given in evi. when the cause of action is diff. tho' it would not be conclusive. If however the title or any fact, decisive of the right, had been put distinctly in issue & found in the former suit, the verdict might be pleaded by way of estoppel & would be conclusive. 3 least 346-54-5-D-66.

You will perceive then, that a verdict may sometimes be evi. tho' not conclusive, when the Judgt. would have been no evi. at all. And there is a great difference between Judgt. & a verdict, as to their Office, nature & effect. By neglecting to observe this difference a vast deal of confusion has been introduced into this part of the Law of Evidence.

A prior Judgt. upon a point or title afterwards bro't in

to question, is a sentence of Law deciding the right. A Verdict is more evi. of a matter of fact, tho' when pleaded by way of stoppel, will be conclusive.

A Judgt. when evi. at all is conclusive. A Verdict is not necessarily so. The Office of a verdict whether it be pleaded or given in evi. under the gen. issue is to prove some matter of fact. But the Office of a Judgt. is not to ascertain fact, but a sentence of the Law upon the facts ascertained by the verdict or otherwise. Dea. 37. 3 Inst. 358 to 365. Thus a brings Trover against B. for a Watch & it is denied. he then brings a second action for a Watch. it being proved or admitted that same Watch, the former Judgt. is conclusive of the right & therefore conclusive of the present action.

On the other hand, if in an action of Trespass B. the Defe. pleads a specific fact, as that "I did seized in fee & devised to him", by which that fact is put directly in issue & it is found. The Verdict is conclusive, as to that fact in any subsequent action, & will estop a party from trying it over again: but what right follows as a consequence of that fact is left to the decision of the Court. A Prior Judgt. then, when evi. at all, is conclusive between the parties & their priors, as to the point or title decided by it - where as a Verdict may be prima facie evi. only, it being conclusive of the fact but not of the rights of the parties. Amb. 756-61- 1 Lev. 235- 1 Day 170 - Dea 34-5-7.

Hence a prior Judgt. except in a few exempt cases, can never be made rise of in any way, unless the cause of action is in both suits the same. For as the prior is to be conclusive, if it is to have any effect at all; it surely ought to be so evi. except when the cause of action is the same. But a verdict tho' conclusive when pleaded by way of stoppel may in many cases be given in evi. when not conclusive. Tho' this cannot be done, unless the point in question came directly in issue in the former suit. Bull. 233-92. 3 Inst 365

Gillb. 29-35- Pea. 37. The Cases however in which a Verdict may be given in evi, tho' not conclusive are those in which the cause of action, right or demand in question is not the same in two cases, tho' depending on the same title or state of facts, for if the cause were the same, the Judgt. would be conclusive & there would be no need of the verdict us vi. Thus if two pieces of land are held by the same D & D or D & D & D, a verdict in Ejectmt. or Dissession as to one piece may be given in evi. in a subsequent action between the same parties for the other piece; for the title is the same, tho' the subject matter is diff. If the subject matter or any cause of action were the same, the verdict would be useless, for the Judgt. would be conclusive. Gillb 20-30- Bull 232- Stra 300- 1151- 2 Mod 142- 5 H. 306-

A prior Verdict in a suit for a nuisance or disturbance may be given in evi. in another suit for the continuance of the same nuisance or a repetition of the disturbance. It is prima facie evi. The cause of action is diff. - yet the right or title out of which the plf's claim arises is the same. 3 Coast 365- Pea 37-8.

I have observed that a verdict in one action might be given in evi. in another between the same parties & their priors. On this subject I have further observed, that a verdict in a prior action for a given piece of land in Eject. may be given in evi. in a subsequent action of Ejectmt. for the same piece of land between the same parties, the Judgt. however is not conclusive (however) in consequence of the same fiction in the English action of Eject. Because the identity of the parties not being provable is a bar by way of estoppel - but the court will take notice of the real parties, for the purpose of admitting the record or verdict of the former suit as evi. Gillb 35 Bull 232- Pea. 40

It is stated in Swift's evi. 10- that verdicts can only be given in evi. as to those facts which are found on a Special issue. This cannot be law for in the cases before mentioned,

of which, evidence & Disturbance, the verdict would have
 to be under the same issue. The true rule is, that a verdict
 cannot be pleaded, in bar by way of stoppage, unless found by a
 Special issue. But a verdict on the genl. issue may be
 av. between the same parties, tho. not conclusive.

Thus far of the effect of Judgments & Verdicts when admitted in
 evi. We are next to consider

For & ⁸⁹⁵Whom a Record is Evidence.

In General the Record, in a former civil suit is no evi.
 in a subsequent one as to the fact or right, which it imports
 to establish except as to those who are parties to it & their privies.
 The Principle is that third persons are not in genl. bound or in
 any way affected by a Judgt. between other persons, unless the
 cause of action in the two cases arise out of the same acts,
 because the latter had no opportunity of cross-examining or con-
 tending agt. the Judgt., bringing a writ for any intervening
 error, or of setting aside on motion for any irregularity, he being
 a stranger to the record. *Gilb. 29-32-3. Tre. Ch. 212. 2 Ray*
1292- 3 Mod 142- Bull 232-3-42- Phil 222-28-

And as the benefit of the rule ought to be mutual, third per-
 sons in genl. cannot take advantage of the Record of a suit be-
 tween other parties, even as agt. one of the same parties, or
 as laid down by Chief Baron Gilbert "nobody can take
 benefit by a verdict who had not been prejudiced by it, had it gone
 contrary." It is therefore a sub. objection, that the transactions in the
 former suit are as to third persons "res inter alios acta" *Gilb.*
34-5- Bull 232- 3 Mod 141- Gard. 472 Phil. 230-3. There are
 some exceptions to the generality of this rule, but the state of such
 on which they are founded, is so complete that I must refer
 you to the Books. *See 329- Gilb. 33-5 2 Ray, 730- Bull 232-*
43 Phil. 232. -

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So also the rule, that a verdict is no *res judicata* except between the same ^{parties} & their privies, is not universal. Thus when one sues for his own benefit the name of another as party to a suit, the verdict will be *res judicata* for & agt. the former, tho. not conclusive, as *rejectus* by Lesson for his Lessee, as *pro. Doe.* agt. A. the record agt. A. Doe. must afterwards be admitted in *res judicata* in an action by A. Doe. Lessee of A. agt. Lesson, for the Court will here take notice that in *rejectus*, the Lesson is the real party interested & that the Lessee, a nominal pty. is a fictitious person, Bull. 232. Gilb. 35. Pea. 40.

So again if the law is not agt. A who justifies as the servant of B. the verdict in this case is *res judicata*, tho. not conclusive, in a subsequent action between the same agt. A who justifies as the servant of B. either for or agt. him, - for B. is virtually the real party in the party on Record, & because he is not nominally the party on Record, the *res judicata* is not conclusive & would not be even if it were on a special issue. Pea. 40. Doug. 517.

There is another exception to the *res judicata* rule where the point in dispute is a question about public right - in such a case, a verdict finding or negating in a given action between certain parties will be *res judicata* in a subsequent action between diff. parties. Thus A sues B in Trespass who defends on the ground of a public right of way & verdict is found agt. B. - A afterwards sues C. who defends in the same manner - the former verdict agt. B. will be *res judicata* agt. C. as it might have been agt. A, if it had gone agt. him in the first action - Here also it is not conclusive. Pea. 11. 21. - Car. 101. 1 East 355.

Suppose a City or other Corporation brings an action agt. A. claiming a certain Toll, by virtue of a custom or prescription, the verdict found in this case will be *res judicata* in a subsequent action agt. A. The probable ground of this rule is, that the right in question being public, & every individual in the community is interested in it, on the possible ground or prejudice, that may accrue to himself from it.

The sentences of Courts whose proceedings are *in rem* as the Courts of Admiralty are in genl. conclusive agt. & for all persons

is a *res in rem* whether warlike or not. Proceedings are said, *in rem* when the action is immediately on the subject of contention, as a ship libelled, if she be condemned the law takes possession & disposed of her. Suppose A. in possession of a ship in a foreign Port. She is libelled & condemned. Now if B. belonging to another continent, appears & claims her, the former Judge excludes him & all mankind. Because all mankind may become parties to such proceedings & therefore are regarded as potentially parties. It is not a suit against the Captain or any other person, the notice given & appear is to all mankind. These proceedings therefore are not to be considered as *inter alios acta*. 8 M. 196 434. 7 M. 523 601 5 M. 255. 2 East 922 2 Bl. 697. 1174. *vid* post 455.

When therefore any matter determined by such a court comes incidentally in question, as, if at all, it must, in a Court of C.L. that sentence is conclusive: as if in an action on a Policy &c. a question of neutrality should arise, a sentence of the Admiralty Court, condemning the ship is conclusive, that she was not neutral, at least the Judge was between other parties & *inter alios*. How far the Registration of a ship is *in rem* for *inter alios* *vid* Phil 308. 11.

The rule is the same as to sentences of Courts having the jurisdiction of Probate of Wills & *Adm.*: & for the same reason: because all persons may be parties. 1 Geo. 235. 3 M. 125. Pea 70ⁿ. 1 Day 170. 2 M. 312. And even where one was indicted for the forgery of a will, he was acquitted at once on producing the Probate of the will, under the Seal of the Ordinary. Stra 401. 703.

So also if A. brings an action as Exr. & B. & C. defend, that A. never was Exr. & B. The Probate of a Will in which A. is named Exr. is conclusive & defe. cannot prove the will was forged for it was declared good by competent authority. 1 Geo. 235. This resembles proceedings *in rem* in being open to all the world & one may appear & claim as heir at law if willing to pay costs in case of failure - & if objection being made for Probate any one may declare himself Executor or Legatee, under a latter will & defeat the application.

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You will find a case in *Speeches' C. Cas. & M.C. Cor.*
Nally's Cedi. which on the first impression would seem to in-
fer the case above (of forgery in *Stranger*) but that case
stands good; the Probate in such cases is conclusive, & no
evi. of Forgery will be admitted. The cases in *Speech* were diff.
the Forger was indicted before the pretended testator was dead;
in this case a Probate was produced, but it had no effect, be-
cause the Ecclesiastical Court acted without authority & the
proceedings were "*Coram non iudice*" & of course void. . .
Speech C.C. 103 - 2 M.C. 429 - That case turned upon this distinc-
tion 3 M. 125. (vid "Hast. Quest.")

There is another case in *2 M.C. 430* - but there the
Probate was obtained by fraud in the proceedings, which rendered
it void. *2 M.C. 430-50-46.*

In genl. sentences in Ecclesiastical Court in Matrimo-
nial causes, as of divorces &c. Marriages are conclusive of the fact
of Marriage when that is incidentally questioned afterwards in a
Court of Law & Equity for or agt. any person. *Colp. & A. claims as*
Heir at Law - such sentence of that Court, which declares him
illegitimate, will be conclusive of that fact. *Sub. 756-62-3-4 C. 29*
7 C. 41 Car. 225. Stra. 961.

Again in an action for *Quia. Con.* with plf's wife,
a prior sentence of the Ecclesiastical Court, annulling the Mar-
riage of plf. with his reputed wife, is conclusive evi. for Deft. *Str.*
960 - Dea 772. Sub. 756-63.

So also if, in an action brot. agt. a man to recover
a debt, due from his reputed wife while sole, a prior sentence of Ec-
clesiastical Court, declaring the marriage null & void, is conclusive
agt. Plf. for it shews, that deft. was never married to this woman &
as the debt was contracted before marriage, he could not be sub-
jected in consequence of giving her credit as his wife. *11 Stater Trial*
235. Pea 672.

You will perceive, that here a record is conclusive
agt. a person who is not party to it. The reason of these rules, as to third

persons, I take to be, that the sentence is in the nature of proceedings "in rem", & therefore should embrace all persons, & also they are not, and can not have been parties. A proceeding in rem is for this purpose considered in the nature of a common assurance, which is evi. as a deed between other parties.

Such a sentence however is not conclusive upon an indictment for Bigamy. Thus if A is indicted for having married B, his wife B being still living, a sentence of Eccl. Court declaring his marriage with C. lawful & good, or his marriage with B to be void is no evi. for he may be convicted notwithstanding such sentence
11 State Tr. 261. Pea 78.

It is difficult to reconcile this with the decision in case of Forgery above alluded to. In support of the last as to the marriage it is said, that the Eccl. Court has not cognizance of crimes, as for instance Forgery, for in such case the King could have made himself a party, but he could not in the marriage case.

And in those cases, if individuals, who were strangers to these proceedings, can show, that the sentence establishing or annulling a marriage was obtained by fraud or collusion between the parties, these being extrinsic facts, which vitiate the most solemn proceedings & being a fraud, on the Court, a stranger may ^{prove} they are fraudulent, for being a stranger to the record he could not come in & reverse it in the Court where it was established - for where there is collusion a party to it can never annul the sentence, and where there is fraud not only on the Court but ^{the} party, then that party can vacate the sentence only by application to the same Court, that rendered it, or one of equal jurisdiction. 4 Amb. 762-3 2 Wm. 246. 11 State Tr. 262.

But there are further exceptions to the rule that a Record is not evi. except between the same parties & their privies. Where a person has been compelled to pay money by suit for another, & then in an action ^{for} reimbursement, he may give in evi. a Record of the former suit ag^t himself, not for the purpose of proving the allegations, that were made & the form in the former trial, or that deft. justly owes

him for the money advanced, or that that money was really due from him. But merely to show, that such a pecuniary was had agt. him & such an amount, & if the case may be, that he paid it on demand, which he produces, endorsed "satisfied." The Record then for is part of the "res gesta" the fact of payment must be proved - Still debt, may deny that he even owed the Debt. that Plf. was his surety & s. plf. is compelled to prove by other testimony all other facts necessary in his case, except that he has paid.

So also, when a Ship. has been subjected by the order of the official act, & default of his Depty - when he sues the Depty, the ship. may exhibit the Record to prove, that he has been subjected & to such an amount for the misconduct of his Depty, but not to prove debt, guilt, or that Deft. is his Depty, & then was, or ever has been or acted as such. That the Ship. was subjected is a part of the "res gesta" & must be proved.

Again an action by an endorser of a Bill, who has been subjected agt. the acceptor. Plf. may give the Record of the former suit as evi. that he has been obliged to pay so much - but that deft. accepted the bill & is liable for so much, & plf. must appear from other testimony. Sec. 238.

In an action on a Covenant of warranty in a 999th of conveyance, the plf. may give in evi. the Record of a prior suit by which he was evicted not for the purpose of showing that the victor had higher title, for this must be made out by other evi. but to show that he has been evicted for without actual eviction he can never recover on a Covenant of warranty. Gilb. W. Vol. 22. 1102 & 1103.

And if the warrantor were vouched in, in the prior suit the Record is conclusive agt. him of the whole case. This is the case when the defe in the first suit, i.e. covenant, on being sued, gives notice to his grantor by writ of voucher. The pending suit gives him thus an opportunity to appear & defend the title he conveyed. In such a case whether he appears or not the Record is conclusive agt. him. Vid. Tit. "Covenant Broken".

So in an action upon the warranty of a title to a chattel as a horse, the plf. may give in evi. the record of a suit agt.

himself, in which the name of the horse was recorded of him for the purpose of showing, that he had lost the horse for without proving that, he proves no damages. But to prove that the seller had no title, or that the person who recovered of the pty. had, must be proved by other testimony. 1 Johns. 517 - Swi. 15.

So also a Record of a former recovery & satisfaction obtained by pty. agt. a stranger for the thing or matter demanded, is evi. for the deft. To prove the fact, that such prior recovery & satisfaction has been had. Co. L. If an indorsee should sue his Indorser after he had recovered of the acceptor - the deft. may plead in bar the former recovery & satisfaction, or give it in evi. as the case may be - So if A & B. were bound jointly & severally in a bond & C. should sue C & alone & should recover, & then sue B. B. might give the Record of the suit agt. C & satisfaction under it, to show in evi. that pty. has been paid.

So also if a Trespass has been committed by A & B. the Verdict & Judgment agt. A. is evi. in favour of B. & in this case you see it is suff. to show a recovery without proving satisfaction. Co. J. 73 vid. Co. L. Broken.

In those cases also in which a party to a suit, derives his title from a Judgment in a former action between himself & a stranger - he may give the prior Record in evi. As in Exec. between A & B. either party may show a title by Judgment & give in evi. a Record of the Exec. by which it was set off. Swi. 14.

Here the Record is of things "res inter alios acta" but the ground on which it is introduced is merely to show, that the pty. has all the title that A. had & is evi. like a deed or common assurance. The consequence would be evi. that pty. had all the title that A. had & that the title was in A. - Thus far as to Verdicts in Civil causes. 3c Hs. 6. 15. 23

Whether a Verdict in a prior Criminal action can be used as evi. of the facts proved by it in a subsequent civil

403.

it suit, is a question not settled even at the present day. One exam-
ple will explain the whole. I committed a Battery upon Broad L. 14.
indicted & convicted. He now sues him in an action for the civil
injury & offers the Record of the former prosecution & conviction
as evi. of Deft's guilt. Phil 237. 642-287-D-4 Burr 2225-4 East
577 note 1501-1 Campb. 915-1 Salk 203-1 Sid 325-Gill 304-2 Bull 245
1 Lamont 520-Hildard & Grantham, cited 2 Vesey 246- & Cas. Tem po-
re Hardw-311-1 Hra. 60-D. Mod. 164-Camb. 72-Stat. Tr. 261-MB.
219-Pea. 41-8-146-D note.

If doubt had not existed in the minds of some eminent
Lawyers, I could hardly consider it a question - It ap-
pears to me so clear that such evi. cannot be admitted. Why
should a Verdict or Judgment in a Criminal Case be evi. rather
than a Record in a Civil suit under the same circumstan-
ces? The case comes precisely within the genl. rule, the Rec-
ord is strictly *res inter alios acta*, and no man ever sup-
posed, that the Record of a prior Civil action for Tort should be
evi. in a subsequent action for the same Tort. So too of Contracts.

The other exceptions to this genl. rule are founded in
sound common sense; & when a record is allowed to be
taken between parties - it is to prove the fact of a former recovery only &
not to establish those facts which were found by the verdict & Judgment.
But in this case the record is offered to show not merely, that Deft. has
been once subjected; but that he is actually guilty of the Trespass char-
ged. I think the weight of authorities incline to my opinion.

But the record of a prior Civil or Criminal case is ad-
missible to show, that such a suit has existed, tho' between diff. par-
ties. As an Indictment for Perjury - the record of the case in
which the Perjury is said to have been committed, not only may,
but must be given in evi. or produced to show, that the suit
said in the Record was tried, but not to prove the facts found by
the verdict & Judgment. Bull 243 - Peake 40.

224.
But a verdict in a former suit is in no case evi. of the facts found by it, until final Judgt. has been rendered or entered upon it. If, therefore, when it is proper to give the verdict in evi., the party produces only the former part of the Record, without the Judgt. it is inadmissible. The Judge being indisputably to show that the verdict stands good & has not been set aside by motion in arrest for a new trial or in some other way. *Stras.* Bull. 243- Phil. 242.

To evi. of the fact found by it is an emphatical part of the rule, for there is no necessity of a Record of Judgt. if the only object in having the verdict, is to show, that such a fact has been ascertained. The verdict is evi. of that fact, whether it remains or is nullified. To prove then that such an issue has been tried the *Quarta*, i.e. the part of the record, which precedes the Judgt. alone is. *Stras.* Bull. 243- Pen 50.

And a verdict out of Chancery with a Decree in Chancery in pursuance of it may also be evi. of the facts found by it, but not unless the decree has been produced, because the decree of such a Court is substantially the same thing as a Judgt. in a Court of law & the same reasoning will apply to both. Bull. 243- Phil. 292- Pen 50.

There are some rules of evi. which it is necessary to attend to, which are not to be found in the Books of C. & L. I refer to the manner of proving Records of one State in the Courts of Justice in another.

Here I would observe, that the acts & Proceedings of Congress & the Records of the U. States' Courts, are provable in one State precisely as domestic acts - of course the rules already laid down apply to them. *Swi. 6-7*

So also under the Constitution of the U. S. according to the construction given it in the Ct. Courts, a Judgt. in one State is of the same solemnity in another, as a domestic Judgt. in one State & there have been decisions to this effect, ~~too~~ in Pennsylvania, both in the State & in U. S. District Courts. In

And such cases were formerly held to be only prima facie evi.
what they imported & proved & establish - The Courts were there obliged to try Sec.
the whole case over again. Their latter decisions agree with those of
Ch. & Pa. Constitution of U.S. Art. 4. Sec. 1. Sec. 6. 7. 2 Dallas 302 -
Córdra. 1801. No. 401. 1 Caines 460 - 1 John 426 - 5 No. 87. 1 Dall. 100 - 219-62.
For recent decisions in N.Y. & John 86-173. These observations do
not apply to the mode of proving, but to the effect of such evi. when proved.
Vid. 9. No. R. 402. For Ch. J. Parsons' opinion - which contains valuable matter.

An Exemplification, attested by the clerk of a Court in one
State must be evi. in another State, be accompanied with a certificate
of the Chief Justice or Sec. (ut supra) 7 Stat. U. States. 153. vid ante 424.

As to the Mode of Proving, the Legislative Acts
of other States: By Stat. of Ch. it is enacted "that the printed Stat.
Books, transmitted by the Legislatures & Executives of other States to the
Govr. & deposited by him, with the Secy of State, may be exemplified
by him & they shall be evi." Stat. Ch. 457. Sec. 6. 7. where I, I
think, a corresponding provision in most of the neighboring States.
This course is adopted to avoid the inconvenience of sending to the
extremity of the Union for certified copies of a whole Stat. for a copy
of a part will not answer. The method adopted is for the Executives
to interchange authentic copies of the Stat. & when the Secy re-
ceives them, he exemplifies the whole Stat. Book at once.

Of Public Writings, not Records.

These partake
of the nature of Records, in as much as they are kept in a fixed place
as Documents or Memorials by public authority & for the use of the pub-
lic. Bull 243 - Pea 51 Gilb. 47.

These public writings are evi. in themselves also, & are
regularly in point of solemnity the highest species of evi. Records or
by exception. Gilb. 47.

They are in gen. proved as records sometimes are evi.
by Copies examined & sworn to as true. Bull 234. 5. Gilb. 56-7. Cowp. 17590.

L.H.L.

2 H. 22. 1104 - Pra. 51. 3. 0.

These Rules relate to the manner of proving the Documents of a State within that State. As to the manner of proving the acts of a neighbouring State, *vid supra* art. 424. 40.

These Documents cannot be called Records, because they are not Memorials of the Law, nor Proceedings of Justice according to the laws & usage of the State; hence, tho. evi. of high authority, they do not come strictly within the denomination of Records Bull. 295 - Gilb. 40.

Of this sort of Public writings there are several kinds: 1st Journals of the Legislature, as contra distinguished from their acts, which are strictly Records; these are merely histories of the proceedings of that body, & may be proved by copy examined & sworn to by a wit. Pra. 53.

But a mere resolution passed by either house of the Legislature as a foundation of other proceedings is no evi. of the fact counted upon or resolved - As that a treasonable combination exists or that such a publication is libellous, & that prosecution was ordered, is no evi. that such combination does exist, or that such writing is libellous. 4 State 239 - Pra. 53

2nd Memorials of Proceedings in a Court of Equity, tho. writings of a Public nature are not Records & that is one of the reasons, why a writ of Error never lies from the Decree of that Court, tho. another lies to the House of Lords. But why are they not records? Because they are not Precedents of Justice according to the strict Law usage of the State; but Memorials of determinations *secundum equum et bonum*. It was formerly supposed, that a Court of Equity was bound to the rigor of no law, but this never was correct. They have always abided by Law & Precedent. Gilb. 40 - Pra. 50 - Bull. 235.

But a Bill in Chancery is evi. only for the purpose of proving the fact, that such Bill was filed, or such other facts as may be proved by mere reputation & Hearsay as of Record. As to these they are on a par with monumental Inscriptions - Family Bibles, &c. &c.

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So that what A may have alleged in a Bill is not evi. agt. him in a ^{subsequent} suit, being regarded as the Statement of Com-
sel merely to obtain an answer. 7 Mod. 23. 179 - Pea 12-54. (Evi.)

Formerly it was supposed, that the facts alleged in the Bill, were evi. agt. the party making them without qualificⁿ, but it is not so now. 1 Sid. 220 - Bull. 235 - Phil. 263.

But an answer in Chancery is evi. agt. the party making it, of the fact alleged in it, as well of the fact, that such an answer was made. This is evi. of a solemn kind, being under oath, whereas the obligations in a bill are not under oath, which constitutes the difference between them. 2 Ven. 194 - 200 - Gibb 50 - Bull. 237.

The answer as evi. is regarded, however, as nothing more than a confession & of course is admissible only where a confession by the same party in a diff. form would be. Hence the confession of a Guardian of an Infant is no evi. agt. the infant in a subsequent suit, as he has no right to confess away any of the rights of the infant & a verbal confession can not be proved neither can an answer. So of an answer of a Trustee &c. 2 Ven. 72 - 3 Mod. 259 - Car. 79 - Bull. 237. 2 R. N. 235. Pea. 54.

But an answer by one of two partners in a suit in Eq^t agt. himself by A. is evi. agt. the other partner in a suit agt. him by B. as such. The reason I suppose to be, that the acknowledgment like the acts of one partner binds the whole. Ely. where one partner pleads the St. of Similitudes, the Jlf. was admitted to prove a confession by another partner, that took the case out of the Stat. 609. - Metherell vs. White. Pea. cas. 16. 203 - Pea. 55 - Bro. Ch. 7 209. 4d. rule 4.

So also a voluntary affidavit by one jointly interested with another has been admitted in an action agt. them both, it being a confession by a party in interest & in the action. Gibb 51-6-7. Pea. R. 55.

But in regard to an answer it is to be observed, as a genl. rule, that a Copy of the ^{whole} answer & not of any particular part only is to be exhibited.

The reasons are obvious. So of a Judgment at law - the whole must be established or in some way proved. The rule is the same as to all written evi. as if a fact is to be proved by a Deed, the whole of the deed must be produced however protif the deed or insulates the facts may be. D. & H. 10 - Pea 55 - Bull 227-3 - 2 Jan 194 - 200.

As the party agt. whom the answer is introduced & who in a subsequent ^{action} is concluded by the admission ⁱⁿ it, agt. himself - soon the other hand, the averments in it, in his own favour are evi. for him & this affords a decisive reason, why the whole answer should be produced & must. So in proving any acknowledgment, all that was said at the time must appear, whether it qualifies or extends & the whole must go to the Jury for them to examine. 2b. author & G. 16. 50. That the parties' allegations in his own favour are not conclusive. Pea 56-7. He may however have them read to the Jury & the other party may falsify if he can.

There is an instance in which an Extract or Part of an Answer may be read in evi. without the residue, & that is, when you wish to show, that a person who is offered as a witness is interested, in the event of the subsequent suit, for otherwise his testimony might be introduced when the other party did not wish it & no man can in the first instance introduce his own depositions in his own favour - but if one attempts to prove the confession of another, the other can call for the whole. Bull 228. or 230 - Pea. 57 - Phil. 264.

An Affidavit made by one of the parties in a former suit is evi. in a subsequent suit for it is similar to an answer in Chancery & is provable like it by Ch. Pea 59.

But a Voluntary Affidavit cannot be thus proved not being a writing of a public nature. By a Voluntary Affidavit is one ^{to} understood, one made ex parte & judicially. So if a Vendor of a chattel states under oath, that he had the title or that it was mine & here. This constitutes no part of the proceedings in a Court of justice.

it is no record & must be proved like any other private document,
1st. This Affidavit must be proved to have been sworn to whereas
an answer in Chancery is proved by swearing the Bill - there
being suff. proof of its being sworn to that there is also in a suit pend-
te lile. 2nd. The Case of a Voluntary Affidavit cannot be given in evi.
sans of an answer. Bull 230. Gilb 51-56. 1 Vern. 53-413. 22 May 311-
734-843-936.

A Deposition used in a former suit is alone & evi.
in a subsequent suit between the same parties, provided the Depo-
nent is dead or out of the reach of process, or not to be found, for
the Wit. might be produced, his Depost. given before, is not the best evi.
An Affid. is in writing taken by the party - & Depⁿ is given
by a witness in writing Gilb. 60-1. Pea 58-9 - Barney v. Jackson & B. not bdy
340 - 4th 170 81-6 - 1st 4th 445. Bull 239 - 1st 4th 14 - 203-5-7.

It has been said, that a Depⁿ in a former suit, between
the same parties is evi. where the Deponent being duly subpoenaed,
gave sick on the way - But this is questionable to say the least, & I think
not law - it might be a substantial reason to postpone the trial
until he recovers, but not for the introduction of secondary evi.
unless it were asserted to by the party. Bull 239 - 4th 14 - 203-4.
Stra. 920 - Gilb. 60 - Pea 59 note.

But the Depⁿ of a wit. like any other deam. of his, either
a written or verbal may be introduced to ~~substantiate~~ the evi.
he may give in Court via a voice altho he is alive & present.
It is not evi. in Chief of the facts as stated in it, but hears upon his
credibility. Pea 58-9.

Whether the Depⁿ of a witness, who at the time of
giving it was disinterested, but who afterwards by ^{the} op-
eration of law, becomes interested as a party, can be read in
evi. is a question which ^{has} divided the opinions of eminent men.
Oly. a Subscribing wit. to a Bond, gives a Depⁿ testifying

to the execution of it; the Abbot died having appointed the 1st
his Exec^r. who now brings an action upon the bond & offers his own
S^{er} in evi. Can it be admitted? Pea. 58. q. Stra 101. Phil 160.
Siz. cas. abt. 224 - Pre. Ch. 123 - Bull 240-2-26 - Esp. 756 - Salk.
206 - Tilly's case - 2 Vern 269 - 2 Cox. 42 - 2 Atk. 615 - 1 Pitt 722-9-
mod - 2 Stra 920-1. 3 Atk. 27.

I have not lately examined these cases, but from pres-
ent recollection there is no real tho' there is an apparent
contradiction among them. The Chancery decisions have been
regularly in favour of the Dep^{ts}. According to my understand-
ing of the cases, the rule is the same at law. The Dep^{ts} who
were excluded, in the case reported by Strange 101. & Salk 206 -
were on interrogatories "de bene esse", which of course can-
not be read in evi. unless the contingency for which they were
taken has happened, & as this contingency was in both cases (read)
the death of the test. they could not be admitted while the parties who
made them were living. The Dep^{ts} referred in the Chancery
cases on the other hand, were for the most part taken pendente
vita & admitted to support a Bill of revivor. The rule of law then
extends to Dep^{ts} de bene esse & Qu. The case in Stra 101, what
Dep^{ts} were those? I conclude they were de bene esse, because
that decision was founded on Tilly's Case. Salk 206 & therefore
do not clash with the Chief determinations) - & as with re-
gard to all other Dep^{ts}, except those taken de bene esse there
is no reason, why the rule at Ch. should differ from the rule
in Ch. Qu. Would Dep^{ts} de bene esse be admissible in Ch?
Ought they not to be admitted at Ch. under the circumstances in
question? That it is admissible vid. to Hs. Rept. 2.

On principle (I have said the road was open for the admis-
sion of it) there is no question, but what these Dep^{ts} should be
admitted. The only objection offered ag^t. them is interest. Now by
the rule of the Ch. to exclude testimony it must be shown,
that he who gave it, was interested at the time of his exam-
ination & there is an abundance of cases, in which wit^{ns}. interested,

See.

in the event of a suit were restored by a deprivation of his interest, and by a release of liability. If Deft's is restored by substitution - for his liability is gone - he may give his testimony for Deft. Now invert the circumstances of this case & it is precisely the same with that of Loh^{ns}. In the one, the witness is interested before he testifies, but is reckoned competent as soon as his liability is gone - In the other, he becomes interested after his examination, shall he not also be deemed competent, when he had no interest? And was he not, anterior to his acquisition of interest in the bond, even more disinterested, than the Bail when whose mind, it may rationally ^{be} supposed, a bias was left in favour of his principal? But the fact is, this contingent ^{equit} is never suff. to exclude any testimony. Phil. 478. Dea 166. Dea vs Baker. 3 Mo. 27. - Parol Evi. Phil. 478. Dea 166 - under the head of competency where a number of similar cases are recited.

But even were we to admit the force of this objection on the ground of interest, it would lead to an absurdity. Thus it would lead to an absurdity, if it be suff. to exclude the Deft's in the case before us, then for the same reason it would vitiate the same Deft's, had the original obligee lost the action on the bond & suffered them in evi. For to admit them, would place him in the language of the Objectors "enabling the Deponent to establish a title to which he may have expected to have become a Claimant" in as much as a recovery would eventually throw the money recovered on the bond into the hands of the Deft. Here the expectations of the deponent are as completely realized, as they would be in a case like the one under cons. where the Deft. is De. poss^r of a share in action. In the same manner it might be shown, that an agreement touching the probability of collusion between the deponent & the original obligee proves too much & therefore nothing.

If it could be shown, (or were there rational ground of

of such cases) that these Depos were made with interest, & since it would certainly form an objection to the admissibility of such testimony, the Deposures if could not be deemed suff. to exclude it in toto.

Deposures de bene esse i.e. such as are taken from a party to perpetuate the testimony of witnesses are admissible ev. when taken under the direction of a Court of Chancery. They are not to be taken pending any particular suit, but by way of caution & in those cases viz: 1st When the test. is about leaving the country - 2nd When he resides abroad - 3rd When he is in a hazardous state of health from old age or infirmity. These are obtained by filing a Bill in Ch. after the other party interested. They are not ev. however, unless the contingency in contemplation of which they were taken, has happened or perhaps the party who was absent has returned. Bull 240 - Hard. 315 - 346. 383. Salk 169. Winds. Ch. 32. vid. post 517. 18.

Deposures de bene esse may likewise be taken under the direction of a Court of Ch. if the test. assents, when they are to be taken under duress in ev. with consent. If he will not consent, the Court will, but if the trial until the other party has an opportunity of filing a Bill in Ch. or until he consents to the test. retires & after all the delay on the party ass. who ass. should refuse the Court will not grant him such ev. as in case of non ass. Phil 10-12. Doug 419 - 1834 P. 211. Cowp 174 - 2 Widd. P. 412.

But Deposures like verdicts are only competent between the parties to the prior suit or controversy in which they were taken or their privies. Other persons had no opportunity to cross examine. Bull 239 - Gilb 61. 1st 445 - 3d 415 - 504 2-24 - 315 314. Phil 100 - 222 - 269.

For the purpose of introducing new introductory proceedings in a Court of Chancery, proof of the prior stages in that Court is necessary. Thus to introduce an answer, a bill must be answered without a bill to authorize or compel it would be a nullity in law. 11th 55-6. Dec. 66.

It however the bill has been lost or destroyed by time or accident it may be proved by secondary evi. even by parol & this rule applies to all written instruments. *Pea. Records 5 Mod 211. 11 W 47. 1 Ven 287. Bull 220. 2 Ld 10. 2 Feb 31.*

A Decree in Chancery is evi. wherever a Judge of law would under similar circumstances, for it is the same thing in effect & is governed by the same rules. It is evi. of the fact & right which it imports to establish. *Pea. 38 40-64-8. Bull 232. 2 Ld 19-32-6. Doug 222. 2 Ld 243.*

The Proceedings in Admiralty Courts & in Magistrate in the Vice Courts are evi. of the same nature & authority as those in Court of Chancery. So Probate & wills & Sentences in a Matrimonial, & Prize Cases &c. These are Public Writings of a solemnity next to that of Records. *Gill 67-3 Ld 195-4 Ld 151. Ray 405-1 Ld 359.* In these cases a sentence or Decree is as conclusive as a Judge at C. B. tho it is not called a Record. It is allowed however to show that the Seal or other Proceedings is forged, for this does not contradiet the sentence or Decree, but proves none exists. *Pea. 69-1 Ld 359. Ray 405.* These Proceedings are also provable by Copies as all other public writings are. *Gill 67-2-3 Ld 154- Doug 572.*

Proceedings
in Admiralty
Court can-
certain evi.

So also
are those
in Probate
Courts.

The Judgment of a Foreign Court is also evi. here of the right Judge if it imports to establish the fact it purports to find - & that it is indubitably so. *Pea. 70.* But as to the Judgment of Foreign Courts in that Country, there is this distinction & is observed; that if the party claiming the benefit of it applies to our Courts to enforce it, it is but prima facie evi. of his claim. The other party may therefore deny it & the Court may enquire what are the laws of the Country where the Judgment was rendered whether the Judgment was rendered according to them; for the party voluntarily submits to the examination & Judgment of our Courts. But if it is used here by way of defence to some action brought here for the same cause, it is as conclusive as a Judgment of our own Court. So as to the Judgment, the proceedings act as in

foreign
Courts
ma facie
evi. of right
or claim is
import to
establish

that is
used by
way of defence
to an action
brought for same
cause conclusive

institum" - he being forced to address the Judge. 2 Will. 410. Doug. 1 -
Pea. 70. Griswold vs. Pittman. 2 Bl. R.

Foreign Judge has proved? A Foreign Judge may be proved. II. 1st By an exemplification under the Great Seal of the State or Kingdom in which it is rendered, which is supposed to be known to the courts of all Nations, 9 Mod. 66 - Pea 73 note 10. 1. 1.

III. 2nd By a sworn Copy, i.e. by a Copy compared with the original & sworn by a wr. in Court. 2 Branch. 107. Phil 301 note. 5 East 473 -

III. 3rd By the attestation of the proper officer of the court with the seal of the court annexed. But this seal you will observe is not supposed to be known to the courts of all the other States, as the National seal is. It must therefore be proved like any other fact. 3 East 231. (Phil 301. Gilb 20. Pea 72 3. The great seal being the common medium of proof established among Nations is supposed to be known by the genuineness of the seal offered, as the Great Seal of the State. The Court may Judge *ex officio*. But the seal of a mere Court, as of the D.C. is to be left to the Jury.

Foreign State has proved?

Foreign State may also be proved by exemplifications under the Great Seal or by Sworn Copies. 2 Branch 107. Swi. 9. As to proving State of neighboring States, vide ante ⁴⁴⁵ & State Ct. 457-8.

Unwritten foreign laws or Customs how proved?

Unwritten foreign Laws or Customs cannot be proved by Common Ordinary parol evi., nor by Copy under exemplification, for they are supposed to be Unwritten - but by the testimony of intelligent & respectable persons, which I apprehend includes only Lawyers & Judges, tho' it may perhaps comprehend others, *Qui libet sua arte credendum est*. 1 John 305-54 - 1 Phil. 431 - Pea 73. note.

In this country the unwritten laws of one State proved in another how?

In this country the usual practice of proving common or unwritten laws of another State, is by the depositions of professional men, & I suppose the unsworn certificate of those men would be evi. Thus in an action agt. the City of London.

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easter Co. Penn. I senton certificates of Lawyers to prove, that none
all by the C. & S. could collect their fees - This not being English
C. & S. at ect.

But a Sentence by a foreign Court of Admiralty as con-
tract distinguished from the Court of C. & S. as to all subjects of their ju-
isdiction are conclusive upon all persons of the right or facts of foreign
which they import to establish, whether they are used to establish a ^{court of ad-}
miralty or ^{miral} ^{con-}
right or defence. The reason is, that they decide from the laws of
nations which is a part of the laws of every civilized communi-
ty, recognized here as well as there. Park. Insur. 353 - 8 T.R.
22-230.

And if a foreign Court of Admiralty state the case on which
they found a given fact. No Court can enquire, whether that was
suff. to establish that fact. The finding then is suff. if the fact found
by way of conclusion. As that the property belonged to an en-
emy - But not of facts stated by way of evi. as the absence of cer-
tain documents. Nu. 11 Phil. 251.

But if it appears from the facts, a foreign Court ^{of Admiralty} has
been without assigning any cause, it is conclusive. ^{by} ^{the} ^{fact} ^{that} ^{the} ^{property} ^{belonged} ^{to} ^{an} ^{enemy}.
Such Court of Admiralty condemns a ship, as lawful prize. It is
conclusive that she is not neutral. She not de-stated. Park 417 - Pen-
11. Phil 251. vid ante 430.7.

But if it appears from the facts, a foreign Court of Admiralty
by a foreign Court, that the condemnation was not for a breach
of the laws of nations but for the non-compliance of some arbitrary de-
mand or municipal regulation, the sentence is void & there-
fore is no evi. whatever. 1523 - 154434 - 362 - Sea 112 - Penn
415. And no Admiralty sentence has any effect whatever by
way of evi. or otherwise, unless the court was regularly established
according to the laws of nations. ^{But if con-} ^{demnation} ^{is} ^{found} ^{on} ^{an} ^{arbi-} ^{trary} ^{de-} ^{mand} ^{or} ^{municipal} ^{regulation} ^{it} ^{is} ^{void}.
Consuls in Spain to hold such Court within the jurisdiction of another
or Sovereign power, Their sentences were void. 8 T.R. 360 - 22 East 473.

Proceedings in Court of Chancery are provable by Copy. ^{Proceedings} ⁱⁿ ^{Court} ^{of} ^{Chancery} ^{are} ^{provable} ^{by} ^{Copy}.
under the Seal of the Courts & that Seal power itself, is, is supposed

The known Seal Courts. Mar. 22-3- Ch. 294-56

The Seal
of a Foreign
Notary
Public is
subscribed to
all known
to the whole
world.

For the same reason the Seal of a foreign Notary Public is subscribed to the known to the whole world, his being an office established by the law of Nations & not the municipal law. The rule is "ex necessitate rei". Yet the Seal of the Court of Ch. is not presumed to be known, tho' that of the most potent Notary Public would be recognized. 10c. Mod. 66-2 Mod. 346- Pa. 74-221. It is in genl. evi. only in relation to foreign bills of Exchange. Phil 321.

It is hardly necessary that I should observe the Public seals of our Courts prove themselves, but the private seals of individuals don't. Gill 20-1 Pa. 73-4- Esp. N. 53- N. H. 303.

Award of
Arbitrators
conclusive

An Award of Arbitrators is as conclusive as a Judgt. of a Court of Law. Arbitrators indeed form a Court, which tho' it is created by the parties is yet sanctioned by Law. Mills 36 Pa. 73. The opinion of an Arbitrator is final & conclusive all matters both of Law & fact have been settled by his decision. 2 Esp. N. 1. 3.

And tho' an Arbitrator cannot transfer real estate like a Court of Eq., yet he can award a transfer & his award will be as conclusive in Eq. as a decree in Eq. The whole amount thereof the rule is blindly laid down by Lord Sothers is, that the Award cannot be a decree nisi in rem & transfer the property instantly, but it can & does determine the title as absolutely. Pa. 75- Deast 15.

It has been a question long for a protest by a Ship Capt. respecting losses, barrating &c. Wm. however it is now settled that it is not evi. in chief, forming part of the fact stated in it, but it may be read for the purpose of impeaching the testimony of the persons who made. 2 Esp. N. 240-691. 8 Day 191 Marshall Ind. 615.

In some cases executive Documents are evi. Copy shown Copies of the entries in the books of the executive Officers of Government, as that of the Secy of the Treasury is of the same State or of U.S. Swi. 22-3. And the same rule holds of other proceedings of Corporations, as if the title to Bank Stock were disputed. The entry of transfer in the books is evi. Pa. 90-1- 2 M. N. 475- Pa. 93-307- Doug 553.

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A private writing as a letter tho. belonging to a pub-
lic body can never regularly be proved by copy - the original
must be proved. Stra. 405. Pea. 96.

The Decrees of an individual coporator are not evi. for the Decrees of
or agt. the Corporation - Ely. The Decrees of a President or Cashier
of a Bank - a Corporation by a trial by proceedings & voted as they
are recorded - Individuals are not regarded. abv. 23. & 24. un-
an individual coporator is not evi. pro
or even the Corporation.

As to Acts of State, as they are called - A Gazette
publication under the sanction & control of government, is
suff. evi. As if one would avoid himself of a Proclamation -
Private Newspapers however would not be evi. We have no
papers under Govt. control or such as the Law notices. 800 436.
Bull 226 - 2d Nat. 479 - Pea 79 - 5th 436. Phil. 304.

The Books of a Public Prison are evi. & show the time of
the prisoner's commitment or discharge which must be learned
from the Record of the books - but not to prove the ground of commit-
ment or discharge a knowledge of this must be obtained from the
Records of Court & is not a fact fit for a prisoner's keeper's
record, other the others are. 2d Nat. 475 - Pea 79 - 3d Nat. 100 - Phil. 313.
So the Log Book of a Ship of War is evi. of the time a country
sailed. 1d Nat. 427. Pea 79 - Phil. 312.

A General History, as Hume's is evi. of such facts & General
& Count of a public nature & admit of no other proof but is not evi. of mat-
ters of a private nature as a particular custom. 2d Nat. 201 - 12th Nat.
85 - 11th Nat. 149 - 13th Nat. 140 - Pea 79 - 23.

Surveys & Inquisitions taken by order of Government
are evi. as between individuals; as Doomsday's Book is of bound-
aries, even at the present day. So surveys recorded by the survey-
or General of the U. S. & surveys of Ports & Harbours taken by
order of the general Government. Pea. 84 - 4th Nat. 100 - 11th Nat. 146 - Pea.
cas 102 - 11th Nat. 170. Phil. 302. - 317.

But private surveys & Inquisitions are evi. only between the same
parties & their privies 2d Nat. 407. Stra. 60 - Pea. 85.

When British Registers are kept as in England, the register itself, or a sworn copy of it is evi. of the Births, Marriages & Deaths, as the Pl. Town records would be, if they were recorded there as the State requires. *Str. 1073. 12a 26.* And the certificates of persons authorized by law to solemnize marriages are evi. of the fact of marriage.

Ancient Maps Those made without public authority are evi. when they accompany patents & agree with the boundaries as adjusted in ancient purchases. *Gill. 75. 1 D. May 732 - Str. 95. 12a 2a 2b. 10.*

Inspection
of Public Pri-
vileges, when
ordered?

In What Cases an Inspection of Public Writings may be ordered in Favour of a party or subject.

Records of Courts of Justice are open to the inspection of all persons interested in them & the proper Officer is bound as of common right to subject & submit them to the inspection of all persons, claiming interest or wishing to prove any thing under *1 Mch 297 2 Str. 1242 - Hard. 120.*

Copies from the Books of Public Officers - as Secy of State, & of Treasury &c. are demandable of right by all persons interested, unless the Government should think, that public policy required their contents should be kept secret. *1 Str. 304 - 2 Mch 616. Dea k. 92.*

If Inspection be requested the Court will by rule grant leave to inspect, i.e. order the Officer to permit an inspection. *Str. 304 - 1005 - 1242 - 2 Mch 616.*

The Books & Papers of a Corporation are also open to the inspection of its members, for they are interested in their contents & in a suit between a Corp^t & an individual Corporator or two members of the Corp^t an inspection may be procured by a rule of Court. But this cannot be done in a Court of Law, between a stranger in a suit & a Corporator in favour of the stranger, for this would be obliging a party to furnish evi. agt. himself, & which the other party has no title, for these Books are not public property like records.

cc. 1 Pl. 609- 3 Pl. 303-579- 8 Pl. 590. 1 Pl. 211- 3 Pl. 390- 2 Pl. 621. *See*
 The inspection in such cases has been granted as authorities show. *See*

A Court of Equity may in its discretion order an inspection of the Corp^r Books in favour of a stranger for it is the conclusive province of this Court to force one to give evi. agt. himself, in favour of another, even his personal oath is required. 3 Pl. 621- 8 Pl. 592-3.

But in a Criminal Prosecution agt. a Corp^r or its members no Court whatever can order an inspection of the Corp^r books, for the maxim is "memores accusare tenentur." 1 Pl. 1710 1 Pl. 239- 1 Pl. 37. Pea. 945.

This last rule does not apply however to informations in the nature of quo warranto agt. the Corp^r, for tho' that proceeding is in form Criminal it is in effect civil & is governed by the same rule as civil proceedings 8 Pl. 574 Pea. 95.

Of Private Writings.

Whenever a fact is to be proved by a deed or other private instrument, the original instrument must be produced, if it is in existence & in the power of the party by whom the fact is to be proved, & if it is not done, no evi. of the contents of the instrument can be rec^d. This is merely an example of the primary & general rule, that the best evi. the nature of the case admits must be produced. 10 Co. 42-3. Gilb 93- Pea. 96-7.

When a Deed is in two parts the counter-part may be read in evi. agt. the party by whom it was made & delivered, tho' not agt. the other party or a stranger. 2 Pl. 14 & counter-deed 8 Pl. 216 & counter-part 8 Pl. 216. The latter is good evi. agt. B. but not agt. A. or a stranger Pea. 96-7.

If however the original instrument be casually lost or destroyed, an examined copy of it, or even parol evi. of its contents may be rec^d. for this evi. which before was secondary, has

now become the best evi. which the nature of the case adm- its of. Here however it is indispensably necessary to prove in the first place that the original one existed & is now lost. (Presumptive evi. will be suff. to prove it lost, but the prior existence of it must be strictly proved 3 T. 151. Tra. 526-70-41 East 506-1 Campb. 193.

The rule it will be recalled is the same as to Records & other public writings. In both cases however if the party voluntarily destroyed the writing he cannot advance this secondary evi., it must have been lost without his fault. If it be so lost, the law will not allow a man to be so deprived of his rights by the casual destruction of his best evi.

A person suing upon a Bond or Note in the past of the adverse party must give notice to his opponent to produce it at the trial, & if he does not, secondary evi. of its content will be admitted. Plf. must prove it "genuine" in possn. of adverse party, & that he had notice to produce it, for if he had not notice, it is the plf's own fault, that it is not produced. 1. 416 446-2 T. 201-2 B. 29-34-6 Tully B. 206-10-Dea. 97 107-Dea. Cas. 165-124. B. 50. The same rule applies to every other Document, as a Letter. But a Court of Law never can compel the opposite party to produce the instrument. All they can do is to allow the admission of secondary evi. - A Court of Equity can compel the production of the original.

The rule is the same in regard to notice as the Law now stands & obtains in Criminal cases. A man indicted for having forged a Note, now in his possn.: secondary evi. of its content may be given after notice to produce it; it was formerly tho't, that no secondary evi. could be admitted ag't a deft. in a Criminal prosecution; but it is now settled, that it can be, even by Conf. or Parol evi. of the contents; so that the rule

is the same in Criminal as Civil proceedings. 2 W. 201. 1 W. 206. Leach. C. Cas. 572. Civ.

Notice is de given in writing according to the Rules of practice & as to the fact of notice; that may be proved without subsequent notice & produce the previous written notice - otherwise notice might require notice ad infinitum. Pea 188-2 W. 239-

And with regard to notice in civil cases notice to the Attorney, is as to the party in person & this is the usual practice 2 W. 203 3 W. 206- Phil. 12-

If the original instrument is in the hands of 3^d persons, they should be served ^{with} a subpoena decernendum & appear & bring with them the original instrument. & if after service they deliver it over to the adverse party secondary evi. may be admitted the party being supposed to have safe notice. Pea. 4 p. 4 20- 24-

If there is a subscribing wit. to an instrument, he must be called in person, if he is alive & in a condition to be examined, for he is deemed the best wit. of the fact of execution as the parties selected him. 5 East 14- 4 W. 239.

But if there are many attesting wits, the evi. may be founded ^{by} any one of them - I am speaking of C. & instruments as Deeds. Co. & Bonds &c. &c. (as to Deeds &c. part) 1 W. 206, Phil 169- 364 note

As a consequence of the Gen. Rule, that a subscribing wit. must be called: it is settled, that even the confession of the party agt. whom an instrument is offered in evi. that it is genuine does not dispense with the necessity of calling the subscribing wit. i.e. it will not be read to the Jury as such evi. Day 216- 23 p. 257- 2 W. 285- 7 W. 267- 1 W. 209- 4 W. 239.

This rule however has been exploded in N. H. & C. for in those States the confession of agt. is considered as good & even better evi. of the execution, than the testimony of the subscribing wit. Sur. 20 9 2 John. 451.

The English rule is adhered to in the English courts, that the original instrument is lost or cancelled, for secondary evidence cannot be admitted, if a subscribing wit. is known who is within the reach of examination of process. Pea. 90 - App. 29 - Pea. cas. 30.

And in England, a confession by defendant in his answer in Chancery is not sufficient evidence of the execution when there is a subscribing wit. unless sufficient reason is shown for not producing the wit. This appears to me to be carrying the rule very far. Pea. 90 note. 4 East 53.

But when Deft. produces a Deed before Commissioners of a Bankrupt & admitted the execution of it, in his examination under oath before them - it affords evidence of the execution without the subscribing wit. There is not only confession, but production by a party. 5 M. 366.

So also where a party pending a suit confesses & agrees to admit the execution of a deed, it is sufficient, tho' the confession alone would not be, for he is bound by his agreement. 2 B. & P. 85 - 5 Esp. cas. 16.

If there is no subscribing wit. inferior evidence, as of the handwriting is admitted & is sufficient to prove the execution. 1 Rev. 25 - Com. d. Exch. 13. 4. & 5 Esp. cas. 16.

So if the person whose name is subscribed as a wit. denies that he saw it executed, other wit. may be called, as a bystander, or the handwriting may be proved which would be sufficient. Pea. cas. 146 - Doug. 216 - 3 Esp. 173 - 2 Camp. 365 - 636 - 10 Ves. jr. 474 - contra 1 Camp. 412 - not law.

I would observe by the way, that it is not necessary, that the attesting wit. should actually have seen the execution of the instrument. it is sufficient, that the party at the time confessed it & requested the wit. to subscribe as a wit. 2 B. & P. 217 - Pea. 90. If it appears, that the name of a fictitious person has been subscribed as that of a wit. by the executing party, the execution may be proved from the handwriting of the party, for it is in legal

effect unattested. Pea. cases. 23. 5 Esch. 16. Phil 363.

The rule is the same where the wit. is interested at Cui.
the time of the exor. & continues at the time of trial so. for the wit. being
incompetent the case is the same, as if the instrument did not pur-
port to be attested. 1 Plt. 209 - Stra. 34 - Pea. R. 147 - 5 Tr 371-
2 East 103 - These suppose the wit. had given collateral security
& obliged at the time of exor., which is in force at time of trial.

The rule also is the same when the person who subscribed
as attest. did it without the knowledge & consent of the parties - for he is
a mere voluntary & not a subscribing wit. within the mean-
ing of the law. 3 Bann. 232 - 4 Taunton 220 - Phil 363

So also if after due exor. nothing can be heard of the
subscribing wit. (who is supposed to be competent) so that the par-
ty can neither produce him nor prove his hand writing Phil.
364 - Argued 23rd - 3 Binnay's R. 192

The rule is the same if the subscribing wit. at the time was
legally infamous, for his oath could not be rec. & therefore his handwri-
ting cannot be proved - the instrument is unattested. Phil. 364.

I would here make one Genl. remark, which is plainly de-
ducible by way of criterion from the foregoing rules, that whenever
the instrument is in fact or in law unattested the exor. may be proved
by secondary evi. as by confession - the testimony of bystanders &
or proof by the party's handwriting, for such then is the best evi. Com. & evi.
B. 3. Pea. cas. 145 - 10 Ves. Jr. 474 - 4 East 53 - 5 Esch. 16.

On the contrary if the instrument is properly attested but
the wit. becomes incompetent by some subsequent causes or method
or cannot be produced, his handwriting may be proved. Thus if the
subscribing wit. becomes interested after exor. by act of law, as becom-
ing Oed. or the party himself or the himself, the only wit. by whom
the instrument could be proved - the wit. handwriting is proved
for he was competent at the time of attestation. 2 East 103 - 1
Plt. 209 - Stra 34 - Phil 362 - 5 Tr 371-2 -

I cannot believe more much than that the British
 Government when that is proper see, is America's ally also
 in the ^{South} American, from which the ^{1st} ^{2nd} ^{3rd} ^{4th} ^{5th} ^{6th} ^{7th} ^{8th} ^{9th} ^{10th} ^{11th} ^{12th} ^{13th} ^{14th} ^{15th} ^{16th} ^{17th} ^{18th} ^{19th} ^{20th} ^{21st} ^{22nd} ^{23rd} ^{24th} ^{25th} ^{26th} ^{27th} ^{28th} ^{29th} ^{30th} ^{31st} ^{32nd} ^{33rd} ^{34th} ^{35th} ^{36th} ^{37th} ^{38th} ^{39th} ^{40th} ^{41st} ^{42nd} ^{43rd} ^{44th} ^{45th} ^{46th} ^{47th} ^{48th} ^{49th} ^{50th} ^{51st} ^{52nd} ^{53rd} ^{54th} ^{55th} ^{56th} ^{57th} ^{58th} ^{59th} ^{60th} ^{61st} ^{62nd} ^{63rd} ^{64th} ^{65th} ^{66th} ^{67th} ^{68th} ^{69th} ^{70th} ^{71st} ^{72nd} ^{73rd} ^{74th} ^{75th} ^{76th} ^{77th} ^{78th} ^{79th} ^{80th} ^{81st} ^{82nd} ^{83rd} ^{84th} ^{85th} ^{86th} ^{87th} ^{88th} ^{89th} ^{90th} ^{91st} ^{92nd} ^{93rd} ^{94th} ^{95th} ^{96th} ^{97th} ^{98th} ^{99th} ^{100th} ^{101st} ^{102nd} ^{103rd} ^{104th} ^{105th} ^{106th} ^{107th} ^{108th} ^{109th} ^{110th} ^{111th} ^{112th} ^{113th} ^{114th} ^{115th} ^{116th} ^{117th} ^{118th} ^{119th} ^{120th} ^{121st} ^{122nd} ^{123rd} ^{124th} ^{125th} ^{126th} ^{127th} ^{128th} ^{129th} ^{130th} ^{131st} ^{132nd} ^{133rd} ^{134th} ^{135th} ^{136th} ^{137th} ^{138th} ^{139th} ^{140th} ^{141st} ^{142nd} ^{143rd} ^{144th} ^{145th} ^{146th} ^{147th} ^{148th} ^{149th} ^{150th} ^{151st} ^{152nd} ^{153rd} ^{154th} ^{155th} ^{156th} ^{157th} ^{158th} ^{159th} ^{160th} ^{161st} ^{162nd} ^{163rd} ^{164th} ^{165th} ^{166th} ^{167th} ^{168th} ^{169th} ^{170th} ^{171st} ^{172nd} ^{173rd} ^{174th} ^{175th} ^{176th} ^{177th} ^{178th} ^{179th} ^{180th} ^{181st} ^{182nd} ^{183rd} ^{184th} ^{185th} ^{186th} ^{187th} ^{188th} ^{189th} ^{190th} ^{191st} ^{192nd} ^{193rd} ^{194th} ^{195th} ^{196th} ^{197th} ^{198th} ^{199th} ^{200th} ^{201st} ^{202nd} ^{203rd} ^{204th} ^{205th} ^{206th} ^{207th} ^{208th} ^{209th} ^{210th} ^{211th} ^{212th} ^{213th} ^{214th} ^{215th} ^{216th} ^{217th} ^{218th} ^{219th} ^{220th} ^{221st} ^{222nd} ^{223rd} ^{224th} ^{225th} ^{226th} ^{227th} ^{228th} ^{229th} ^{230th} ^{231st} ^{232nd} ^{233rd} ^{234th} ^{235th} ^{236th} ^{237th} ^{238th} ^{239th} ^{240th} ^{241st} ^{242nd} ^{243rd} ^{244th} ^{245th} ^{246th} ^{247th} ^{248th} ^{249th} ^{250th} ^{251st} ^{252nd} ^{253rd} ^{254th} ^{255th} ^{256th} ^{257th} ^{258th} ^{259th} ^{260th} ^{261st} ^{262nd} ^{263rd} ^{264th} ^{265th} ^{266th} ^{267th} ^{268th} ^{269th} ^{270th} ^{271st} ^{272nd} ^{273rd} ^{274th} ^{275th} ^{276th} ^{277th} ^{278th} ^{279th} ^{280th} ^{281st} ^{282nd} ^{283rd} ^{284th} ^{285th} ^{286th} ^{287th} ^{288th} ^{289th} ^{290th} ^{291st} ^{292nd} ^{293rd} ^{294th} ^{295th} ^{296th} ^{297th} ^{298th} ^{299th} ^{300th} ^{301st} ^{302nd} ^{303rd} ^{304th} ^{305th} ^{306th} ^{307th} ^{308th} ^{309th} ^{310th} ^{311th} ^{312th} ^{313th} ^{314th} ^{315th} ^{316th} ^{317th} ^{318th} ^{319th} ^{320th} ^{321st} ^{322nd} ^{323rd} ^{324th} ^{325th} ^{326th} ^{327th} ^{328th} ^{329th} ^{330th} ^{331st} ^{332nd} ^{333rd} ^{334th} ^{335th} ^{336th} ^{337th} ^{338th} ^{339th} ^{340th} ^{341st} ^{342nd} ^{343rd} ^{344th} ^{345th} ^{346th} ^{347th} ^{348th} ^{349th} ^{350th} ^{351st} ^{352nd} ^{353rd} ^{354th} ^{355th} ^{356th} ^{357th} ^{358th} ^{359th} ^{360th} ^{361st} ^{362nd} ^{363rd} ^{364th} ^{365th} ^{366th} ^{367th} ^{368th} ^{369th} ^{370th} ^{371st} ^{372nd} ^{373rd} ^{374th} ^{375th} ^{376th} ^{377th} ^{378th} ^{379th} ^{380th} ^{381st} ^{382nd} ^{383rd} ^{384th} ^{385th} ^{386th} ^{387th} ^{388th} ^{389th} ^{390th} ^{391st} ^{392nd} ^{393rd} ^{394th} ^{395th} ^{396th} ^{397th} ^{398th} ^{399th} ^{400th} ^{401st} ^{402nd} ^{403rd} ^{404th} ^{405th} ^{406th} ^{407th} ^{408th} ^{409th} ^{410th} ^{411th} ^{412th} ^{413th} ^{414th} ^{415th} ^{416th}

So also if the subscribing list is lost or presumed lost
to justify handwriting is sought. 12. Mod 607. Pen. 110-113.
C. D. 360. 7th 265. 1 John 230. 1 John can. 22p. 2. 4th 4 p.

So also if a subscribing wr. is blind, so that he cannot identify for himself, or if he becomes insane, proof of his writing is lost. prima facie ev. deduc. De Kay 784-5 Exp. ca. 16th of Feb. p. 304 Phil 362.

The rule is the same when the test. becomes legally in-
famous after the date of the instrument. 20th 833 - Exp. S. 259. Will.
362 - 584. exp. 162.

So also if the per. at the time of trial is in a foreign State
or abroad, whether domiciled, or not, *con.* This handwriting is
slight, *Quest* 254 - *resp* 250 - *Pen. cas. 99* - *18 esp. cas. 1* - *Pen. 100* - *7*
M. 266 - *Qu. 93* - *1 B. & P. 361*.

The rule is the same if after diligent search the subscribing wit. cannot be found. This he is not proved to have gone abroad. Day.
89-a 43 - 2 East 103 - 7 Ill 266 - 2 Campb. 702 - 1 Br P. 360 - 11 Wh. 64.

For in all cases where the subscribing wr^t. is not in a situa-
tion to be examined, proof of his handwriting is deemed the best possi-
ble evi. & if there are several attesting wr^ts. neither of whom can be ex-
amined, evi. of the handwriting of one of them is suff. Phil. 16 g. 361.

And proof of the handwriting of the test. has been adjudged suff., without any proof whatever of the party's hand & the weight of authority is that it is not necessary to prove the handwriting in this case, tho' it is usual to do it. I confess, I do not see why proof of the party's handwriting is not the best evi. for proof of the testator's handwriting, does not show, that he would testify, if produced that the instrument was legally executed in his presence. (Va. 99-100 - Phil. 360.

Phil. 169. 360-3. 3 East 103. 1 B&P 360. 1 John. 461. 7 M 266. According
to several opinions, the party's hand, in this case must be proved. 7
M 266. note 2. 2 Raymond 27. 3 Bin. 191. 2 Bay 187. 1 W. 255.

And in these cases proof of the handwriting of the wrt. is
evi. of everything appearing on the face of the instrument. The signing,
Sealing & delivery will be presumed from the force of Attestation.
Campb. 375 Phil. 363.

And where the law does not require a subscribing wrt. as to
a Bond. Note of hand or Co. proof of the handwriting of the party
alone is suff. Sur. 27-3.

Where there were three obligors & no attesting wrt. one
of them alone being sued, the others were permitted to testify to exam. by
deft. Stra 35 Phil. 364 n. This always appears to me to be questionable
from the interest of the party. The confession of one joint obligor
binds the other it is true - but will it prove, that A. is a co-
obligor?

Then in any the preceding cases, the secondary evi. is
said to be suff. the meaning is, that it is suff. to render the instru-
ment admissible evi. to the Jury, i.e. it authorizes the court
to permit it going to the Jury.

If there are two subscribing wrts. of whom, one only is in
a condition to be examined, he must regularly be produced. Pea. 101-2
But if both are in a condition that prevent an examination proof of
the handwriting of one of them is suff. tho' it is clearly advisable
to prove that of both. 1 B&P 360. 1 M 266. 310. 2 East 100.

In all the preceding cases if the wrt. cannot be examined
in the instrument. properly sealed & delivered. it is strong evi. to the
Jury, that all the formalities in reading &c. have been complied with.
Pea. 99 con. Gilb 101. Bull 254.

In proving A. C. to the validity of which 3 sub-
scribing wrts. are required by Stat. if any one is in a condition
to be examined he must appear, ^{or} his hand, is not suff. Pea 101-
2-372. Thus far the rule is the same as in proving Co. instruments.

If however they are all dead you must prove the handwriting of all of them. The signing, sealing & delivery will be presumed from the form of attestation, just also if the testator's hand must be adduced. Here the rule varies from that of 6 & 7 instrument 49 in proving them the handwriting of one wrt. is suff. & he proved & it is in no case necessary to prove the handwriting of the party executing. Com. R. 530 - Stra 1109 - Pea 101. 372 -

And in such a case, such evi. being produced unless strong circumstances appear to the contrary a compliance with all the formalities & requisites of the Stat. will be presumed. 6 Auth. Bull 165.

If the wrts. are all living, the evi. of one will be suff. if he testifies to all the requisites, unless the Devise is disputed, when all the wrts. in condition to be examined must be called. 10 W. 741 - 1 Bl. R. 635 - 4 Burr 2224 - Bull 264 - Pea. 101.

But a Court of Chancery will never decree a Devise - provided, unless all the wrts. capable of testifying are examined, even tho. one be beyond sea, & the Devise is not disputed. The reason is that a Decree of the Court of Chancery is conclusive upon all the parties in the suit. Whereas a Judgt. in Law in Egist. for instance in which one party claims title under the will is not thus extrinsically conclusive. Now Dev. 710 - 1 Wils. 216 - 1 Ves. 171.

Our Court of Probate will declare a Will proved on the testimony of one wrt. if he swears to all the requisites. There is however an appeal from this Court to the Supr. Court. Swi. 27

Tho. all the attesting wrts. to a Will should deny the execution of it, yet it may still be proved by the testimony of other wrts. tho. they are first taken oath. Their testimony is not conclusive. 11 Bl. R. 365. Bull 264. 2 Stra 1096 - Skin. 299 - 436.

If there is a D.C. offered in evi. was executed itself by a power of attorney. The power itself must be proved like any other instrument, i.e. (Decd) the execution of both must be proved by the party claiming under them. Sugden's Vendors. 262 - 1 Esp. 40 - 4th 259 - Swi. 20.

I have observed to you, that proof of the contents of the instrument might be made out by proof of the handwriting. The Question then arises, in

What manner the Handwriting is to be proved? The simplest evi. of this would be the testimony of one who saw it subscribed by the person.

It is usual to be a rule, that the belief of the wit. must be recd. both in civil & criminal cases. 1 Burr 642 - Pra 102 - But to render this belief availing at all, it must be founded on a peculiar acquaintance with the handwriting of the party, for without this, cannot be permitted to testify at all & this acquaintance must have been derived from having actually seen him write. & recd. letters from him in the course of correspondence; it is not suff. to have seen writing purporting to be his. 1 Burr 647 - 1 Bl. 4. 304 - Bull. 235-6 - Pea. 102-4. 4 pp. 11 & 12. And the wit. having seen the party write his name, pending the suit to show the wit. his mode of signing is not suff. to let in his evi. This would permit a party to make evi. for himself. 1 Esp. 14-15 - Phill. 207 - 1 K. 477 - 4 Esp. 273.

And a wit. in testifying his opinion must speak solely from the appearance of the writing without taking into cons. any extrinsic facts whatever - as that he should not suppose, that def. would give such a hand &c. &c. Pea. Cas. 142 - Pea. 102-3.

And in proving the handwriting of a lit. evi. that another instrument attested by him was forged, is not admissible to counteract any presumption arising from proof of his handwriting. It is irrelevant. Pea. 103 note.

In the proof of Handwriting there is one species of evi. about which there is much dispute viz Com. Sim. (Comparison of Hands) & on this subject the Goal. Rule is, that Comparison of Hands is no evi. whatever in any case either civil or Criminal. 1 Burr 644 - Bull 236 - 4 Bl. 350 - 4 Bl. 497 - 10 Esp. 351 - 4 Bl. 273-276. Pea. 104.

Now in most of the rules applying to this subject, there has been no definition given of comparison of hands, if there had been, much misapprehen-

sion would have been avoided. It means a comparison by the jury, between the writing in question & the other writings proved or admitted to be the parties' (sunk) - Or a similar comparison to be made by a wit. who is to testify his opinion from the similarity or dissimilarity of the two writings 4 Esp. 273 - a.b.c. &c. See 104 Reg. Section on a Bond. The question is, did debt. sign it? To prove it jly. offers in evi. other instruments which are admitted or proved to have been signed by debt. that jury may take some care to compare them with the bond, - This is not admissible? Again, suppose, the question to be the same, but jly. offers a wit. who is unacquainted with debt's hand to testify as to his opinion after comparison. This is also inadmissible.

So that comparison of hands is no evi. & the rule has long been settled in civil & criminal cases - altho' it was formerly tho't to be admissible in civil cases - Hence much fault has been found with the conviction of that staunch Champion of Liberty, Algernon Sidney, as the papers proved to be his, or said to be were from comparison of hands. His conviction however as far as it regards the evi. was perfectly & clearly legal, both according to the rules of law at that time & at the present. vid. 6 Anne 190, 350. 3 State, T. 802 - Phil. 366 - That this rule is now generally auth. above & 116. 53 - McAl. 394. 6 Anne 190 note 190-1. 4 Esp. Cas. 273. In Ct. comparison of hands has been allowed, but must it would not be considered as law now - it is not any when the evi. 30 - Root 107 - The decision doubtless went upon the ground that our Juries were composed of men who could read & write & therefore could judge from comparison. But the fact is, it is a matter of the utmost requiring the keenest perception with most delicate discrimination & doubt, whether there ever was a jury upon earth capable of doing it, & no evi. should ever be submitted to a jury which even the Juror could not comprehend. For the law on this subject in Ct. vid. 116. 53.

But when the antiquity of writings renders a personal knowledge of the party's hand impossible - as the old entries in a Parish Register - a wit. who had made himself acquainted

ted with the characters there used by often inspecting them may be admissible ev. ex necessitate rei, for this forms an exceptⁿ ion to the Genl. rule. Bull 236. Pea. 104.

And it seems, that persons technically skilled in de-
tecting Forgeries have been admitted to prove, that the signing
in question appears to have been written in a "feigned disguised
hand" but the rule was never carried so far in England as to al-
low such persons to testify from a comparison of hands - I think
however according to principle - such skilful persons - as Bank
Clerks & Inspectors of Frauds, &c. who they never were acquainted
with the party's hand might be permitted to give their opinion
from comparison & there has been a decision of this kind lately
by at Hartford Ct. 4 M 497 - 4 Rep. c. ar. 146 - Pea. 105-6 - 4 H 4
11-12 - Phil 370-374 - Said Henryon is opposed to the English rule
last stated - but it appears the law.

There are cases in which, instrument may be read in
evid. without any direct proof of their exow - as if it were
in the possⁿ of the adverse party & after notice he produces it at
the trial - it may be read, without proof of exow, because the
party himself produces it as genuine. Bea. 100-9-5 Exf. cas. 17
2 J.R. 43-4-

And the rule was once determined to be the same, when the adverse party, who produced the instrument, was not himself a party, the instrument. But it was decided & I think very properly, Contrary, for either he may have an interest in it - yet not being a party, he cannot be presumed to know, whether it is genuine or not. 8 West 540.

It is an established rule also, that a S&S of 30 years standing may be read, in ev. without proof of its validity. The Court has followed the terms of the S&S & there is no erasure or alteration apparent. Bulk 255-£16100-16b.p. 271-2 Bl. R. 532-2 M. 466-5 M. 259-Exp. 8. 1774.

This rule however being founded in presumption does not hold, where there are circumstances, given which a contrary presumption arises, as if the deed appears attested on a land or deed given in charge, possession here there must be direct proof of use. Bull 55. Gilb. 100. Pea 110.

The recital of one deed in another has been considered as suff. evi. of the execution of the recited deed as agst. the party to the reciting deed. - E.g. recital of a former deed by the grantor in a subsequent one. - 2 Atk. 206. - Pea 111.

This species of evi. is now however regarded as secondary & therefore admissible only when the recited deed is shown to be lost or some other suff. reason given for not producing it. Harv. 190. - 2 Dev. & Divi 100. - 6 Atk. 45.

Formerly if there was any erasure interlineation or apparent alteration in a deed the judges determined upon its probative value it was good or bad. But in modern practice, that is left to the Jury, under the issue of non est factum. 10 Co. 92. - Gilb. 104.

We are next to enquire
How far Written Instruments may be explained by Evidence "Stipendi".

A Deed or other instrument when proved is conclusive upon the parties to it. Hence neither of them can contradict the terms, statement or stipulations in the deed by parol evi. The deed being higher & more solemn, and is a familiar rule to the C. B. 5 Co. 60. 2 Co. 155. 3 Atk. 275. - 1 Bro. Ch. 92. Thus if a Bond is payable immediately, it is incompetent to say. To prove it payable a year hence. (see 1 Co. 110.)

But a Latent Ambiguity arising in the construction of a Deed or other instrument, as a Devise, may be explained by other evi. of parol. 1 Atk. 703. - 1 Atk. 730. 1 Bro. Ch. 470. - Pea 112. By a Latent Ambiguity is meant an uncertainty arising not upon the face of the instrument, but from some extrinsic facts known.

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able by parol. This (kind) kind of uncertainty may be explained away by parol. Thus a devise is made to A & B & it appears, that there are two persons of that name - or the devise is of Blackacre when the testator has two farms of that nature & name. Here it is competent for the parties to show which of the two was intended. There is no ambiguity in the instrument. As it is produced entirely by extrinsic causes, it may be removed in the same manner. 1 Pl. 66-560-682 D. Co. 155-1 Pl. 420-2 Pl. 35-2 Ves. 266.

So where the devisees name is mistaken or wrongfully written in the devise, the party may prove, that it is the familiar nickname by which the testator used to call him. 2 Pl. 141. 1 Doug.

But where there is such a mistake the Deed, of the testator, made long before the time of making the will are not admissible evi. - This would be going too far from the instrument & beyond the proof, existing facts merely. 6 Pl. 671- Pea. 114 note.

If however the name of the intended devisee is entirely omitted nothing extrinsic can explain it. The Ambiguity is Patent & to explain that would be to make a devise for the testator. 21 Pl. 240. Pea. 117.

But wherever the ambiguity is Patent any circumstances which conduce to prove the testator's intent are admissible evi. Roll 676.

When there is a right name & wrong description given to the devisee, the devise may still be carried into effect by parol testimony, if there is no other person to whom the description applied, if there were parol explanatory evi. would contradict some part of the devise. 2 Pl. 204 & 13. The eldest son of A. the devise may be good, if A. had no eldest son. A.B. being in case.

And the rule holds *converso* if the name is wrong & the description is right, as a devise to A.B. Bishop of London, where was no such person as A.B. 1 Bro. Ch. 30-1 Ves. Jr. 266-2 Pl. 42-6 Pl. 671- -

So also Parol evi. is admissible to rebut an equity or to

oust an implication arising upon the face of the instrument: As to the first branch of this rule "to rebut an equity." Suppose A. brings a Bill in Chancery against B. on a written Instrument. Now if there has been a subsequent parol agreement varying the terms of the original agreement between the parties, it may be proved to rebut A's equity. This is diff. from the rule of law & the reason of the admission of such evi. in Chancery is, that it is discretionary with that Court to enforce an equity or not. 1 Taub. 384 - Wern. 240 - 10 Bos. C. 247 - 5 Alb. Cas. 77 - 30 Ark. 40 - 1 Bro. Chy 201 - "Powers of Chy" - Phil 440 66.

As to the latter branch of the Rule "Parol evi. is admitted to rebut an implication." You will observe that implications always prevail, unless evi. is introduced to rebut them.

Now it is a Genl. rule of the C. J., that the residuum of testator's property goes to the Exr. If the Exr. has a legacy given him, the presumption is, that the testator intended to ^{pay} it to the Exr. in payment of the residuum. But this is an equitable presumption & the Exr. may introduce parol evi. to shew, that the testator did not intend to deprive him of the residuum, but the adverse ^{party} cannot introduce parol testimony to shew, that he did not so intend, for this would be to contradict the legal presumption & alter the apparent intention of the testator. 10 C. 113 - 2 Alb. Cas. 240 - 2 Ark. 297 - 1 Bos. C. 447 - 24 Ark. 68 - 220 - 2 W. 91. Again it is a General rule, that the marriage of the testator & the birth of a child after making a will is an implied revocation, it is presumed from the fact, that if he had foreseen them, he would not have made the will, as he had done. Such is the equitable presumption - parol evi. may be introduced to prove his intention, that the will should stand, but not to prove, that he wished it not to stand 5 W. 49 - Doug. 31. Pea 114 - 2 Ark. 516.

But the presumption arising from a change of testator's estate cannot be removed by parol evi. of intention.

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because in this case a positive rule of law (& not the intention) governs. 2 Hbl. 216 - Pea 114.

A Patent Ambiguity is one, arising out of the terms of the instrument & appearing on the face of it, & it cannot in general be explained by any parol evi. whatever. One great & safe reason is, that it is not created by parol evi. & therefore cannot be removed by it. Besides these Ambiguities are matters of legal construction & of course like matters of law to be determined from the face of the instrument itself, 2 Vern 674. 3 Bro. Ch. 311 2 Atk 239¹ 3 Hb. 257 - 3 Ves. j. 148 - 4 Hb 600 -

Suppose a Deviser meant thus, "I give &c to one of the sons of A." he leaves several, the devise is void for uncertainty. The words imports, that there are several without distinguishing - So where A the owner of several buildings, devises "one of my buildings to B." This cannot be explained by parol -

In some attempt cases however (which are the explained by example) patent ambiguities have been explained & words have even recd. a construction diff. from their ordinary import. not however by proving the Devis. of the testator for there are inadmissible; but by parol proof of such extrinsic facts - as the value of the property - Condition of the family or estate &c. Thus A devises his house called the "Bell Tavern" to B. the question was, "was it intended to be an estate in fee or for life? The facts were that A. had only a remainder in the house, dependent on an estate tail which of course must drop before A.'s estate could vest in fee, & B. in all human probability would die long before that - decided then, that B. should be allowed to take in fee. 1 Bro. Ch. 472 - Pow. Dec. 50 - 19 - Pea 116 2 Eq. Cas. 290 - 3 Bro. 1890 - Pre. Ch. 71 - Salt 234 - 3 D. Reg 831.

But parol evi. is not admissible to contradict enlarge or restrain the express terms of a written instrument. Thus if there

is a lease or agreement for a lease for 10 years at £100
Rent - parol evi. of an agreement made at the time of lease
that it should be for 15 years or 50 £ rent is not admissible
2 Bl. 1249 - 3 Wils. 275 - 1 Bro. Ch. 92 - 249 - 15 Eas. 288 - 62 L. J. 512
1 Rev. C. 429 - 31 - (Case p. 47 - (See a subsequent agreement might
be proved to rebut an equity.)

But a collateral matter about which the written a-
greement is silent & is not conversant may be proved by parol
as if nothing were said in the lease as to repairs - a parol
agreement as to the person who should make them might
be proved. 2 Bl. 1250 - 5 Eas. 739 -

And parol evi. is always admissible to prove that,
the written instrument, is or is not the act of the party whose act
it imports to be - as that a deed was not sealed & deliv-
ered - that the Seal was never read, & the Deed -
that he was insane or did not execute it - for here the
instrument is not used to contradict a valid instrument, but to
show, that no such instrument exists. 8 Wils. 147 - Peak. 118.

So also parol evi. (parol evi.) is always admissible to
show the Contract to be illegal, or given for an usurious
Cause, & here it denies the existence. 2 Wils. 347 - Rev. C. 477 - 3
T. Repts. 474.

So also parol evi. is admissible to show, that an ap-
parent illegality in an instrument, was occasioned by mistake
of the Seal or Seal - by a Bond made as if it was usurious
Rev. C. 501.

If an ambiguity arises in an ancient instrument, and
from usage and it which is in the nature of a particular
construction may be proved to explain it. 3 Wils. 576 - 2 Eas.
279 - 28 - 4 Eas. 118 - 6 Eas. 118 - Case p. 242 - 4 Eas. 327.

Here you will observe the evi. is not to prove or to
show what the parties meant by the terms used - but to show

a constant usage under the deed - it is like a presumption. But the usage of a few years cannot be admitted this. (Case of 1819 denied) 3 Ves. 278 - 6 B. 237 - 2 A. 1649 -

By the term written instrument as I have constantly used it you are to understand a written instrument under seal. A written instrument, not under seal, is regarded at C. as of no higher authority or solemnity than a parol agreement (except in the case of a will & it may be contradicted or explained by parol testimony. Thus a receipt reading "in full of all demands" & not under seal may be proved not to include all demands. Secus. if sealed. 2 B. 366 - 5 Ves. 707. 1 John. 145 - 2 John. 378 - 3 B. 319 - 5 B. 68 - 8 B. 309 - 9 B. 310. 12 B. 531. Phil. 74.

When Shop Books are admissible & their regular kept. vid 2 C. 117. is in action of ac. &c.

Parol Evidence.

I.st Who are competent witnesses & who are not? I would premise that a wit. is said to be competent when he may be legally admitted to testify at all & this competency of a wit. is a question of law to be determined by the Court & is preliminary to his examination in chief. The Credibility is the credit to which his testimony is entitled & is matter of fact for the Jury. 1 Burr 417.

In genl. all persons, not rendered incompetent by some legal disqualification are of course admissible wits. 1 M. & S. 95-6. But there are many grounds of disqualification. No person can be admitted as a wit. who is non compos mentis, or just in the full possession of his understanding. Gill 144. P. 122.

Idiot & except in mind intervals insane persons are not competent wits. Bull 293. Gill 144. P. 123-3. so also infants of so tender an age as to be incapable of understanding the obligation of an oath for the same reason. on that point the rule is that if an infant is of the age of 14.

he is prima facie competent as an adult. 11th Feb. 1843.
- 12th Feb. 1843. 11th Feb. 1843.

Under the age of 14 no infant's competency depends on an
apparent understanding & this is the ascertainment by previous
examination by the Court. The Presumption however is not the
admission. 11th Feb. 1843. 12th Feb. 1843.

Formerly it was supposed, that no person under the age
of 9 could testify in any case or on any locality. These un-
der 10 were seldom admitted. 11th Feb. 1843. 12th Feb. 1843.
The rule now is, that a child of any age however young
may be admitted, if apparently acquainted with the obliga-
tion of an oath. We have a case where one was convicted
of a Capital Crime, principally on the testimony of a child
of 7 years old. 11th Feb. 1843. 12th Feb. 1843. 13th Feb. 1843.
14th Feb. 1843. 15th Feb. 1843. 16th Feb. 1843. 17th Feb. 1843.
18th Feb. 1843. 19th Feb. 1843. 20th Feb. 1843. 21st Feb. 1843.
22nd Feb. 1843. 23rd Feb. 1843. 24th Feb. 1843. 25th Feb. 1843.
26th Feb. 1843. 27th Feb. 1843. 28th Feb. 1843. 29th Feb. 1843.
1st Mar. 1843. 2nd Mar. 1843. 3rd Mar. 1843. 4th Mar. 1843.
5th Mar. 1843. 6th Mar. 1843. 7th Mar. 1843. 8th Mar. 1843.
9th Mar. 1843. 10th Mar. 1843. 11th Mar. 1843. 12th Mar. 1843.
13th Mar. 1843. 14th Mar. 1843. 15th Mar. 1843. 16th Mar. 1843.
17th Mar. 1843. 18th Mar. 1843. 19th Mar. 1843. 20th Mar. 1843.
21st Mar. 1843. 22nd Mar. 1843. 23rd Mar. 1843. 24th Mar. 1843.
25th Mar. 1843. 26th Mar. 1843. 27th Mar. 1843. 28th Mar. 1843.
29th Mar. 1843. 30th Mar. 1843. 31st Mar. 1843.

Formerly suspects too young were admitted to give infor-
mation without oath, but this practice is now exploded. There
is no such thing known in Courts of Justice, as informa-
tion without oath or something equivalent. 11th Feb. 1843. 12th Feb. 1843.
13th Feb. 1843. 14th Feb. 1843. 15th Feb. 1843. 16th Feb. 1843.
17th Feb. 1843. 18th Feb. 1843. 19th Feb. 1843. 20th Feb. 1843.
21st Feb. 1843. 22nd Feb. 1843. 23rd Feb. 1843. 24th Feb. 1843.
25th Feb. 1843. 26th Feb. 1843. 27th Feb. 1843. 28th Feb. 1843.
29th Feb. 1843. 1st Mar. 1843. 2nd Mar. 1843. 3rd Mar. 1843.
4th Mar. 1843. 5th Mar. 1843. 6th Mar. 1843. 7th Mar. 1843.
8th Mar. 1843. 9th Mar. 1843. 10th Mar. 1843. 11th Mar. 1843.
12th Mar. 1843. 13th Mar. 1843. 14th Mar. 1843. 15th Mar. 1843.
16th Mar. 1843. 17th Mar. 1843. 18th Mar. 1843. 19th Mar. 1843.
20th Mar. 1843. 21st Mar. 1843. 22nd Mar. 1843. 23rd Mar. 1843.
24th Mar. 1843. 25th Mar. 1843. 26th Mar. 1843. 27th Mar. 1843.
28th Mar. 1843. 29th Mar. 1843. 30th Mar. 1843. 31st Mar. 1843.

The Constitution of the Court is not at all an ob-
jection to the Competency of a Wit. - as to the local reputations of
the various States, I am not informed. 11th Feb. 1843. 12th Feb. 1843.
13th Feb. 1843. 14th Feb. 1843. 15th Feb. 1843. 16th Feb. 1843.
17th Feb. 1843. 18th Feb. 1843. 19th Feb. 1843. 20th Feb. 1843.
21st Feb. 1843. 22nd Feb. 1843. 23rd Feb. 1843. 24th Feb. 1843.
25th Feb. 1843. 26th Feb. 1843. 27th Feb. 1843. 28th Feb. 1843.
29th Feb. 1843. 1st Mar. 1843. 2nd Mar. 1843. 3rd Mar. 1843.
4th Mar. 1843. 5th Mar. 1843. 6th Mar. 1843. 7th Mar. 1843.
8th Mar. 1843. 9th Mar. 1843. 10th Mar. 1843. 11th Mar. 1843.
12th Mar. 1843. 13th Mar. 1843. 14th Mar. 1843. 15th Mar. 1843.
16th Mar. 1843. 17th Mar. 1843. 18th Mar. 1843. 19th Mar. 1843.
20th Mar. 1843. 21st Mar. 1843. 22nd Mar. 1843. 23rd Mar. 1843.
24th Mar. 1843. 25th Mar. 1843. 26th Mar. 1843. 27th Mar. 1843.
28th Mar. 1843. 29th Mar. 1843. 30th Mar. 1843. 31st Mar. 1843.

Persons deaf & dumb, if shown to be of suff. under-
standing may testify by signs through an interpreter. The interpreter
in this case must be sworn. 11th Feb. 1843. 12th Feb. 1843.
13th Feb. 1843. 14th Feb. 1843. 15th Feb. 1843. 16th Feb. 1843.
17th Feb. 1843. 18th Feb. 1843. 19th Feb. 1843. 20th Feb. 1843.
21st Feb. 1843. 22nd Feb. 1843. 23rd Feb. 1843. 24th Feb. 1843.
25th Feb. 1843. 26th Feb. 1843. 27th Feb. 1843. 28th Feb. 1843.
29th Feb. 1843. 1st Mar. 1843. 2nd Mar. 1843. 3rd Mar. 1843.
4th Mar. 1843. 5th Mar. 1843. 6th Mar. 1843. 7th Mar. 1843.
8th Mar. 1843. 9th Mar. 1843. 10th Mar. 1843. 11th Mar. 1843.
12th Mar. 1843. 13th Mar. 1843. 14th Mar. 1843. 15th Mar. 1843.
16th Mar. 1843. 17th Mar. 1843. 18th Mar. 1843. 19th Mar. 1843.
20th Mar. 1843. 21st Mar. 1843. 22nd Mar. 1843. 23rd Mar. 1843.
24th Mar. 1843. 25th Mar. 1843. 26th Mar. 1843. 27th Mar. 1843.
28th Mar. 1843. 29th Mar. 1843. 30th Mar. 1843. 31st Mar. 1843.

And even Ignorance may disqualify a person who
is a Wit, as where it appears from previous examination, that
he is altogether Ignorant of the obligation of an oath or Future
State. 11th Feb. 1843. 12th Feb. 1843. 13th Feb. 1843. 14th Feb. 1843.
15th Feb. 1843. 16th Feb. 1843. 17th Feb. 1843. 18th Feb. 1843.
19th Feb. 1843. 20th Feb. 1843. 21st Feb. 1843. 22nd Feb. 1843.
23rd Feb. 1843. 24th Feb. 1843. 25th Feb. 1843. 26th Feb. 1843.
27th Feb. 1843. 28th Feb. 1843. 29th Feb. 1843. 1st Mar. 1843.
2nd Mar. 1843. 3rd Mar. 1843. 4th Mar. 1843. 5th Mar. 1843.
6th Mar. 1843. 7th Mar. 1843. 8th Mar. 1843. 9th Mar. 1843.
10th Mar. 1843. 11th Mar. 1843. 12th Mar. 1843. 13th Mar. 1843.
14th Mar. 1843. 15th Mar. 1843. 16th Mar. 1843. 17th Mar. 1843.
18th Mar. 1843. 19th Mar. 1843. 20th Mar. 1843. 21st Mar. 1843.
22nd Mar. 1843. 23rd Mar. 1843. 24th Mar. 1843. 25th Mar. 1843.
26th Mar. 1843. 27th Mar. 1843. 28th Mar. 1843. 29th Mar. 1843.
30th Mar. 1843. 31st Mar. 1843.

600.

One, a native Indian on the previous examination was asked, "are you a Christian?" & replied, "No, I am a Presbyterian," yet his testimony was admitted.

A person may be incompetent to testify from the infamy of his character & the rule is that a person legally infamous is regularly an incompetent wit. in any case. Dea. 114 - Gilb. 139 - 1 S. 6. 156^a & 8^a. Sta. 833-1140 - A person legally infamous is meant one who has been convicted of some infamous crime, as Treason, Felony, or the Crimes of Perjury, Forgery, or any thing which impeaches the character or veracity. As Barratry or Conspiracy 2 Wils. 10 - Co. b. 3 - 5. Mod. 75 - 1 McAl. 206. De 468 - 1 S. 6. 156 - Sta. 1140 - Gilb. 139 & holding that a conviction as an Indictment for crimes of Treason, Forgery, or any thing which impeaches the character or veracity is sufficient to render a witness incompetent to testify. 2 Wils. 10.

The rule formerly was that the conviction of a crime which incurred an infamous corporal punishment, as the Pillory was a disqualification no matter what might have been the offence. But now the infamy depends upon the crime, without regard to the punishment. 1 S. 6. 156. 2 Rule 3. C. 27 - D. 1 McAl. 140 - 206 - D. 2 Wils. 10 - 1 S. 6. 156 - 90 - Hence the conviction of an infamous offence as Barratry renders the wit. incompetent to testify, altho. the punishment should be a fine which is not infamous. 1 S. 6. 156. 2 Wils. 10 - Gilb. 140 - Dea. 127.

On the other hand, a conviction of an offence not infamous as Debt tho. followed by an infamous punishment, as the Pillory does not destroy one's competency. 3 Dea. 420 - 1 McAl. 207 - Gilb. 141

Where legal infamy is merely a consequence of conviction the party is restored to his competency by a Pardon from the executive, as of Perjury or any crime, infamous at C.D. & is pardoned by the King. 1 Wils. 349 - 2 Wils. 257 - D. 1 McAl. 212 - 1 S. 6. 156 - 90 - Dea. 124. -

But when the incompetency is by Stat. made a substantive part of the punishment, a pardon by the Executive does not restore the party to his competency, as a conviction of Perjury under the Stat. of Eliz. for a pardon or by dispensation with the legal consequences of the Stat. & does not destroy the Stat. itself nor a constituent part of it. 1 Will. 228. Salk. 514 - 690 - 3 L. 226.

In the latter case where incompetency is a part of the Stat. nothing short of a reversal of the Stat. or a Stat. pardon will restore the competency of the party. Salk. 609 - Com. D. Les. 4. 5.

If one is convicted of a clergyable felony & is burned in the hand, the burning restores the competency, for a Stat. pardon by Stat. being a substitute for execution. Ray 380 - Key 37. 8 - Poach 115 - Pea. 120.

But a conviction for infamous Crime without a Stat. is no evi. whatever of the fact found by it in any case. Bull 243 - Stra 161 - Pea 49 - Com. D. evi. 2. 6 Test. main - a - 5

But proof of the infliction of punishment rendered by Stat. is material necessary to the disqualification of a wit. The infamy incurred does not depend upon the punishment. If the conviction is had & Stat. rendered the infamy is complete. Com. D. 16. 1 Will. 10. 5. Mod. 5.

And it seems now to be settled on principle & by numerous & weighty authorities after a series of contradictory decisions, that the proof of the witness' legal infamy can be made out no other way, than by producing the Record of Conviction. 8 East 77 - Bull 192 - Com. D. 16. 1 Will. 256 - Salk 653 - 12. Mod. 584.

It was formerly the practice to enquire of a wit. upon his "Vaire Dire" whether he had been convicted of an infamous Crime & it may be doubted whether this was & is the rule, still - by some. 4 Mo. 440 - 1. Will. 210. 13.

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Locci.

1 McCat. 512-3 East 452 - But it does not appear settled whether a wit. is bound to answer such a question - I think on principle, he is not. If a question is asked a wit. the answer which would disgrace or expose him to punishment by the C. J., he is not bound to give & the party cannot insist on the rejection of a wit. on the ground of infamy, unless he produces the best evi. viz: the Record of his conviction. 3 Binn. 210-510 - 13 East 58. n. Phil. 206-7-8 - Salk. 153.

Whether a wit. is bound to give evi. that might subject him, appears not settled at C. J. But by the Stat. 46. C. 3. a wit. in such a case is compellable to give evidence & Phillips 208.

The rule that a person legally infamous is disabled & debarred relates principally to suit, to answer other parties & he may make an Affidavit to defend himself from charges advanced on a Motion for information or attachment, otherwise he would be deprived of the means of defence. Salk. 461 - 1 McCat. 211.

The genl. character of a wit. not legally infamous, may be proved, not indeed, to exclude him, but to detract from his credibility - no one is incompetent from disgrace, unless it amounts to legal infamy & the evi. which the law admits thus to impeach his credit is confined to his genl. character, for that, the party is presumed to be ready to defend so that you cannot prove that he was formerly addicted to lying or that he did lie in a particular instance. Bull. 296 - 4 Esp. 102 - 8 Lill 202 - Pen. 125.

And this evi. relating to the wit's genl. character can be given by those only who are acquainted with his genl. character - And the appropriate question in the English practice is, whether in the opinion of the impeaching

Wit. he ought to be believed under oath or whether he would believe him under oath. Pea. cas. 11. 4 Esp. 183-4 - Phil. 212 Pea. 125-

In Ct. on the contrary as our practice has always been a wit. called to impeach another is never allowed to testify his opinion of the credibility of a wit. The question being what is his gen. reputation for truth & veracity among those who know him.

But tho' gen. evi. can be given in the first instance to impeach the wit. yet the party who produces him may call on the impeaching wit. to disclose the grounds on which that opinion is founded. 4 Esp. 183-4 - Phil. 212 - Pea. cas. 11. Pea. 125.

If the Wits to a Will are dead, & dead in procuring it is suspected. The devisees must prove their gen. character for probity & I think the same rule would hold whether they were dead or alive. The only case which has occurred on the subject was where the Wits were dead. 4 Esp. cas. 50 - Phil. 213.

Previous Deeds, made by a wit. out of court & which are inconsistent with those in court may be proved & impeach those in court or his evi. but this goes not to his competency but only to discredit him - Hence a letter written by him or a Deposition signed by him, may be used as evi. to contradict his testimony & so any other act inconsistent with his testimony. 2 Esp. cas. 691 - Pea. 50-9 - 125-6 - 3 Baines 279 - Phil 212. 1 Haywood. 438.

After the death of a subscribing wit. to Will his confession on his death bed, that the Will was forged may be given in evi. to counteract the presumption arising from his attestation. A Deed of his made under other circumstances, not having the sanction of an oath would not be evi. 3 Burr 1244-55 - 1 K. & J. 306 - 6 East 180.

But the party producing a wit. is never allowed to impeach his character at all for it would be enormous to

case him in court on purpose to destroy him, if he had the means of so doing, he might force the wit. to speak for himself. Still however the party may introduce a wit. to rectify a mistake made by his wit. or to set off an error, but not to impeach his genl. character. Bull. 297- Plamph. 556- Phil 213-14.

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Cvi.

And as one party may impeach the genl. character of his adversary's wit. so may he introduce another to support his own, but not unless his witness' character is impeached. - Phillips 212.

According to Et. practice also, a party who produces a wit. may by way of answer to the impeaching testimony prove that the wit. has on other occasions made the same statement which he impeaches. But this is doubtful in England. Gill. 135- & 1802 in support of the Et. rule. Contra Bull. 294- pro. Phil 252-3.

The testimony of a wit. may be also impeached, by proving that he was intoxicated at the time of the transaction &c. &c. 201- Phil 213 note a.

An accomplice or particeps criminis, even tho' he may impeach his credit, may testify agst. his fellow offender. When agst. his fellow in civil cases, he is interested, as for trespass. Still however as the record in one case will not prove the fact, the interest will not exclude him. Cases Temp. Lord Hardw. 163- 2 Hawk 600-9- Sta 420- Bull. 206- Esp. 725.

And if an accomplice whom the plf. or prosecutor wishes to produce as a wit. is by inadvertency or otherwise made a Co-deft. the plf. if the prosecution is civil, may with his consent strike out his name, or if it be criminal he may enter a *Volunt. Prosequi*, for the same purpose viz: to examine him. Bull. 205- 1 Sid. 441- Pea. 138-9-

That an accomplice has recd. a promise of pardon or reward, on condition of his giving evi. goes only to his competency not his creditability. but if he bound himself to testify

entirely to the other part. It is said to exclude him on the condition is to give ev. only. The presumption is that he will give true ev. 1 W. & A. 140-200 - Feeling 10-2 Hawk 200.

It was formerly supposed that Infidels, Pagans &c. were incompetent Wit. as having no due regard to the obligation of an Oath. 1 W. & A. 70-71 - Pea. 139-40 - Lord Coke was very zealous in support of this rule, for he had a strong impression, that no person could (except a Christian, tell the truth unless by mistake.

The General Rule now however is that all persons except Atheists are admitted to testify, when not excluded by other incapacity - i.e. want of belief will not exclude any one, unless such person is an Atheist. - for no exception can be taken to Wit. if ^{he acknowledges} the being of God. The obligation of an Oath or a Future State of Retribution: but persons disbelieving either of these are incompetent Wit. 1 Little 21 - Will, 520 - Which is the best case on the subject in the Books 1 Will. 84 - Stra 1104 - 1 M. & A. 64 - 95-6-261. 3 C. 2. 367. n. 14.

R. H. 369.
n. 14.

Since Infidels, believing all these doctrines are permitted to testify when sworn, according to their own notions of a binding sanction. Cf. Mahometans on the Koran - Jews on the Old Testament &c. with 1 M. & A. 95-110 & Little 95. That persons disbelieving those doctrines are not admissible.

The proper question is not, whether the Wit. offered believes in the Gospel, but whether he believes in the being of a God ut supra: it is wholly improper to enquire whether he believes in the Christian Religion. Pea. cas. 11-1. M. & A. 261 accord.

The question whether he believes in the doctrines is usually decided by examining him without Oath, previous to his examination in Chief, &c. &c. The enquiry has sometimes been made after he has testified in Chief by way of Cross-examination, but this appears to be a proper

terious mode & instructions supposed to be correct. 4 Day 56-7-10 W. Stal.
259- And the Ct. courts have in one instance at least admit
to proof, of the previous deas, of the test. I have his disbelief
in those doctrines. 4 Day 56- but think this should not hold
for a false decon (as it might be) not made under oath
of court might thus be introduced with all the officiousness of
Perjury. The question should be put on the previous examina-
tion, & then only.

403.
Cvi.

Quakers, who believe it immoral to take any oath
are admitted to give evi. without oath, under affirmation
by certain English Stat. in Civil cases, but not in crimina-
l Prosecutions by Stat. 7 & 8. M. 3- & 102. C. 1- & 22. C. 2.
2 Burr 1117- 3 Stra 554-72-946. 3 Bl. 369. n. 14.

But in a criminal case a Quaker's Affirmation
in form of an affidavit may be read, to exculpate himself
as on a motion for an information or attachment 2 Burr
1117- Pea 143- There are Stat. in every State in the Union, I
apprehend, permitting Quakers to testify on affirmation in all
Cases Criminal as well as Civil.

Another & the most usual ground of incompetency
in a Witness is

IInd Interest

Formerly an interest in
the question on Trial, rendered the witness in many cases in-
deed, in general Incompetent. 2 Lk 203- 3 Stra 1043- 1 T. R. 300
Pea R 144-5.

This being the most usual objection & the rule being
intricate it is important in the first place to understand
what is meant by an "Interest in the Question" & an
"Interest in the Event". By Interest in the Question is
meant the influence a wit. is under from being in the same sit-
uation with the party by whom it is offered in relation to the

fact to be tried: or it is that influence which he is under having or being exposed to some claim which may arise out of the fact in question, tho' his right would not be affected by the verdict or judgment of the case on trial & tho' he has no immediate interest in the event of the suit. Phil. 35-6-7- Pea. 144-5.

Thus in an action agt. one of several Underwriters & a policy of Insurance. Another Underwriter who offered as a wit. for def. has an interest in the question. 3 T.R. 27- Pad - So if there are two separate Indictments agt. 2 B. for swearing to the same facts, & when called on by B. to testify in regard to them, is said to have an interest in the question, for the acquittal or conviction of the prisoner could not subject or release him.

Again, suppose a Master bring an action per quod servitium amissum for beating his servant & offers the servant as a wit. according to 2d Mansfield he is interested in the question only, for tho' his right of recovery depends on the same state of facts, yet the record can be of no use of them in his action. Pea. 166- Stra 595-944-1854-3 Mill 48-1 East 472.

And it is now settled since the great case of Bent v. Baker that this species of interest or influence goes only to the credit of the wit. & not to his competency. 3 T.R. 36-4 Burr. 2255-2 N. 496-1 T.R. 163-302-7 T.R. 60-603-5 T.R. 603 4 T.R. 20 589-1 H.B.L. 303-3 B.L. 369. n. 15.

The General Rule therefore is that a wit. is not disqualified on the ground of interest unless he is in a situation to be benefited or prejudiced by the event of the suit. 16. auth. Pea. 144 Phil. 36- Leach 155-1 H. Nal. 176.

Hence in Criminal Prosecutions the person injured by the offence charged is regularly a competent wit. for the prosecution tho' he has or may have a claim on the party

injuring for the civil injury, involved in the crime. 4 Burr. 2255. *See*
 11 Mod. 38-40. This rule indeed is in gen. satisfied that he
 is a competent witness. The verdict in the public prosecution cannot
 be given in civ. in the civil suit. Now there is no conceiv-
 able case at C.S. in which the verdict in a criminal prosecu-
 tion can be given in civ. in the civil suit. The qualifica-
 tion then arises only in case of a prosecution on stat. Pea 146. & 45-6.
 Thus in an indictment agt. A. for the stealing goods of B. B. is a
 competent wit. to prove the theft. So in case of assault &
 battery. Yet after this B. may have an action agt. A. for
 the same record cannot be given in civ. nor can the crim-
 inal prosecution at all affect the civil suit; therefore B. &
 interest is solely in the question. 1 Sid. 211- 1. 11 Ch. 53-
 Hard. 331- 1 Roll 403- 2 M. 685.

And when an indictment for robbery, tho by the
 English law the party robbed is entitled to his goods again on
 conviction. Yet he is a competent wit. to prove the robbery
 Here then he has not a direct interest in the case or has
 he? He has not in our own country, for his right to resti-
 tution does not depend on this proof of the robbery. 1 M. 141
 50-61- 116-144- Leach 36. 290- 9 M. 30.

So if one be indicted for a cheat-swindler &c. 11 M.
 94- Salk 226- Hard. 358- Contra Salk 283- Stra 1043- Two last
 cases are not law.

So in an indictment for Perjury the individual
 injured by it is a competent wit. for the Crown. 4 Burr. 2255.
 11 East 581- Stra 1230- Pea. cas. 104- Contra Stra 1104- 10-42
 Hard. 331- Salk 283- The last cases are not law & are merely in
 the & guard you agt. them.

And in case of Perjury it is immaterial whether
 or the wit. or party injured by the testimony is giving which
 the perjury was committed, has satisfied the judge. Thus recoo-
 ed agt. him or not. tho it was formerly holden that this made a difference.
 4 Burr 2255- 4 East 577- 4 Dallas 412- Contra 11 M. 7- Pea. cas. 12- not law.

And it is said that under a prosecution for Perjury on the Stat. 5 Edw. the aggrieved by the offence is a competent wit. altho. he has half of the forfeiture & the reason assigned is that the Record of Conviction on the Indictment, would not be evic. in his favour in a subsequent suit. But I think this rule is incorrect. The truth is his title to a recovery is grounded on the conviction, the fact of which constitutes a part of the "res gesta" Phil. 88. He appears confident that the above rule is a true one - but (scab) the weight of authority is against him. Gilb. 124 - 2 Roll. 685 - Bull 209 - Dohay 1209.

And each person's townham boundaries are given for apprehending & prosecuting offenders & conviction are competent wits. agst. them. Miller 422 - Pea 152ⁿ 171 - 1 McNeil 50 b1 116-44-79 - 3 East 455 - 4 Ib. 100 -

But it will occur that the wits are immediately interested in the event for they are entitled to part of the bounty. This is a strong exception to the General Rule - But were it not so the object of the Stat. would be defeated. The Stat. then implicitly makes them competent tho. by C.L. they are not so.

There are other particular examples in which a wit tho. interested is competent. On an Indictment agst. a debtor for tearing up a vote of hands, the creditor is a competent wit. Stra. 595.

So also upon a public prosecution under the Stat. of Usury the borrower or debtor is a competent wit. & prove the whole case whether he has repaid the Loan, is the Usurious Debt, or not, tho. it was formerly held that he was not, unless he had paid up the Debt on the ground of interest in the question. 4 Burr. 2257 - 2 Ib. 496 - 7 Mo. 606 - 1 Caine, 68 - 5 Mo. 2. 53 - Phil. 34 - note - 39 & 40 note.

But a prosecutor on Penal Stat. who is entitled to part of

the penally is not a competent wit. to testify in support of the prosecution for as he is entitled to part of the avails of the Indgt. he has an immediate interest in the verdict. Stra. 215-142 of 95. Pea. 221. 152ⁿ. Contra Q. 16. 132-3. Mod. 114.

In the single case of a prosecution for Forgery it has been uniformly holden that the party by whom the instrument purports to have been made is incompetent to testify for the public, provided the instrument supposing it to be genuine would subject him to a suit, or deprive him of a right or claim. Qly. A note of hand is forged in the name of A. It is not a competent wit. because the instrument if genuine would subject him to pay money. This rule has prevailed from the earliest period of Judicial History to the present time. 2 Ld. Raym. 172 - Stra 770 - Phil. 88 90 - 2 East P. C. 10 - 19 - 255 - 2 East P. C. 998 - 2. W. 87 - Pea 147 - 168 - 9 - The most important case is in *Hardress* 334. *Waltham*. Saw contra in *Mr. 3. Mr. R. 25*.

And his incompetency extend to every fact which might conduce to prove the forgery - it is not confined to the mere handwriting. In the celebrated case of *Dr. Dodd* who was indicted, convicted & executed for Forgery on a note which he signed *Dr. Chesterfield's* name, the latter was not permitted to testify until a release was given him by the party in favour of whom the note was made. However as *Dr. Dodd's* collateral fact not conducing to prove the offence, the party in whose name the instrument was forged is competent wit. 2 East. P. C. 996 7 - 11th Val. 143 - 2 East P. C. 487 - Phil. 89.

Upon what principle this rule has been established in case of Forgery, no man I think has ever been enabled to discover. Nor in case of Robbery - Perjury & every other case the wit. is competent to testify. There has been much speculation on the foundation of this rule. vid Phil. 91. note c. where it is said that the rule does not generally prevail in this country. The truth appears to be that this is an anomaly sup.

ported by the strength of Precedents & contrary to analogy. But no Justice in England has had the hardihood to overrule it. says Judge Gould.

This rule however would not hold where the party in whose name the instrument is forged would not be personally affected by it supposing it to be genuine. Hence a Cashier is competent to prove a forgery on the Bank. French. Ch. 350 - 1st Ed. 120 - 1-2-3 - Phil. 89 - Pea. 169 -

So also where a Banker has paid a forged draft but had struck it off his account thus destroying all claims to the payment of it - he was held to be a competent wit. for here also the instrument if genuine would not affect his interests. Bull 209 - 2 East Par. 6. o. C. 1000. French Ch. 57 - Pea. 169 - There are several similar examples among these authorities.

But where the wit. would be at all affected by it, he is incompetent & the rule has incorrectly been extended to all persons interested in the question. E.g. an Indictment for forging a Will, the Exr. to the good Will has been deemed incompetent to prove the other a forgery - So of a Deed. Here the interests is merely in the question. Pea 169 - Hard. 331 - 3 Salk 172. But the latter part of the rule is not now regarded as law & Lord Mansfield has very explicitly exploded the two examples. 4 Burr 2254.

But a person whose name has been forged to an instrument of any kind may be restored to competency by a release from him in whose favour it purports to have been made. Such was the fact in Dr Dodd's Case French. Ch. 104. Phillips 99. Pea. 169 notes. In this he is competent without release. 3c Mo. R. 84. 5.

But in Ch. the General Rule excluding the party in whose name the instrument has been forged is exploded & he is held a competent wit. without a release - So decided in c Mo. & Penn. & I think it has been virtually in N.Y. 1 Mo. 7. 2 Mo. 82 - 1 Dallas 110 - 2 Mo. 229 - 2 Mo. Day's (ed.) note of American case. 4 John. 296 - 302 - 3.

Interest in the Event,

409.

ccv.

The General Rule is. That a party interested in the Event of the Suit is an incompetent witness. 3 Alb. 36-7 Alb. 60-603-4 Burr 2257-5-2 Alb. 496- Pea 144-5-6-104-70- Phil. 429-50. I have already excepted the case of Perjury & perjuries under the Stat. of Eliz:-

What then is an Interest in the Event of a Suit? It is an immediate & certain benefit or disadvantage to ensue to the wit. from the result of the suit. This definition is too general I think I can give a better one.

A Witness is interested in the event only when on the one hand, he will acquire some certain right or exemption from liability, from loss by a determination in favour of the party by whom he is offered - or when on the other hand he will incur some certain immediate loss or liability & loss in consequence of a determination in favour of the opposite party. 3 Alb. 32-4 Alb. 20-2 John. cas. 238-4 John. R. 302-5 Alb. 257-

And generally, tho' not universally the question whether a wit. is or is not interested in the event of a suit is determined by another - whether the record of the suit in which he is offered can afterwards be given in ev. for or agt. him in a Cause in which he is a party. This has in many instances been deemed the only criterion, but I shall hereafter point out cases in which it is not so - 3 Alb. 32-3-6-7 Alb. 60-4 East 58-4 John. 230-5 Alb. 144- That this is not the only criterion, see 7 Alb. 62-2 John. cas. 226-4 Alb. 19-5 Alb. 667-2 East 561- Phil 572.

Cases of Interest in the Event, where the Record would be evidence.

In a suit where A. claims a right of common by custom. B. claiming under the same custom is not a

competent wit. for et. You will recollect that a Verdict finding a cus-
tom is evi. for or agt. third persons 12 R. 302 - 2 R. 32 - 2 R. 731 -
Bull 283 - 2 John. 170 - Phil. 44 - 5.

So also if the party offered as a wit. would be liable for
the costs of the suit on either side, he is incompetent to
testify on that side for in an action for the costs the record
would be evi. Sdy. Guardian or Prochein ami cannot tes-
tify for an Infant. Stra. 584 - 1026 - Gilb. 107 - 1 R. cas. 72 -
12 R. 491 - 1 Wil. 130 - Phil. 49.

The same rule hold as to any one who has agreed to in-
demnify either party agt. the costs for the Record would be evi.
So also as to any one who has given security to answer the
costs if recovered agt. plff. Sdy. A giver stand upon the writ
ie. enters into a recognizance for plff. The Cognizor is not
an admissible wit. Stra 179 - 575 - 11 John. 57.

For the same reason debt Bail cannot testify for
deft. he being responsible for whatever may be recovered
agt. deft. & he cannot be subjected without the Record. The bail
however may be restored to competency by substitution. 1 R.
164 - 8 John. 407. & bail will be discharged on application Phil 44 D & John 407.

So in an action agt. a Shf. for breach or neglect of
duty by his Deputy. The Deputy is not competent to testify with-
out a release of his own liability over to the Shf. For should
Plff. succeed or prevail the Record would be evi. not indeed
that the Deputy committed the wrong, but that the Shf. had
been subjected to such an amount 2 D Ray 1411 - Stra 1450 -
3 Campb. 523 - Pea. 165.

So also in an action agt. the Master for an injury
done his servant the latter is not competent to testify
for the Master, until he himself is released by the Master
for the Record would be an essential part of the master's
cause of action agt. the servant. 4 R. 589 - 2 D Ray 1007 - 1 Campb.
251 - 3 R. 576 - Pea. cas. 53 - 84 - 1 R. p. 339

491.

But that a release restores the servant to competency vid. Peri.
Hra. 1003 - 1 Rep. 339 - Pea. 53-83.

Again in an action on a Policy of Assurance
as to the Barratry of the master, the latter is not
competent to testify for the Underwriters unless they have
released him for the record of recovery agst. the under-
writer and the evi. of the fact & amount of recovery,
agst. the master. 1 Rep. R. 339 - Pea. 166 Phil. 47 - For
analogous case vid. 1 Bl. 306 - 1 Baugh 400 - Stra 575.

So on the contrary if Wit. for Plf. would be sub-
jecting self. exonerate himself of any liability he is in-
competent. For his interest is the same whether exonerated
or subjected. 3d. Guardian not a competent wit. for his
ward, for a recovery by ward would prevent Guardi-
an's liability to costs. Pea. Cas. 84 - Cas. Term Hardw.-
202 - Stra 506 - 1026 - 2 Hl. R. 444 - 4 Hl. 658.

On this principle a grantor who has conveyed land
with a cove. of seisin or warranty is inadmissible to
prove grantee's title in eject. for by proving grantee's title
he exonerates himself from any claim agst. himself upon
his own covenants. Pea 170 - 2 Roll 685 - 3 Day 33 - 2 John.
394 - 6 Hl. 523.

The same rule holds as to a lessor with cove. when
an action of eject. is brot. agst. his lessee, he is incompe-
tent whether the cove. be express or implied for quiet
enjoyment from the word "demise" 4 Rep. 164 - Phil 74^m.

So the vendor of a chattel is incompetent to testify
for his vendee in a suit agst. the latter, calling his own ti-
tle in question. 6 John. 5 - Phil. 74^m.

But a grantor lessor or vendor without covenant
of title or warranty express or implied is a competent wit. for or agst. the
purchaser under him for he has no interest. Stra 445 - Pea. 170.

So also where the vendor has co-occupied or co-arranged a gift. Those claiming title under him self merely he is a competent test. as in the case of a common gift claim deed or release for if the purchaser is ^{by one of the parties to the deed} convicted, he has no claim over agt. the vendor 4 M. R. 441-2 Binnery 95-100-500-

So the Inhabitants of a Town or Parish liable to be rated for their poor, if not actually rated, are competent test. for the town or parish on a question of settlement of paupers, for the interest is contingent - seems if actually rated. 4 T. R. 17-65 R. 107-2 East 56- Pea. 163-4-

This last rule is laid down founded on the supposed necessity of the case & is universal in this Stat. Ct. even tho' they are actually rated for the maintenance of their Paupers - (Part of Corporations & their Officers members &c.)

And by the English rule as well as that of Ct. the Inhabitants of a Parish are allowed to testify in support of a Quis Tam action or Prosecution for a penalty, tho' the penalty when recovered would go in support of their poor. The interest here is too contingent & remote to exclude them as test. Their liability or prospect of advantage from the event is too uncertain & minute Phil. 40th

It is a rule that Third persons not a party to a suit in Equity are competent to testify that he himself is not debt or in possⁿ. This appears like a rule sure general in the Court. has an immediate interest proceeds on the supposition that he is in possⁿ. So that if Off. presently he will be ousted forthwith. 1 John. 275-12 M. or John R. 246-

Thus far of the Competency of Third Persons we shall next treat of

Competency of Parties & their Incompetency.

As a third person is incompetent to testify in favour of his own interest, still less can a party to a suit

testify for himself or his Co-party, for he has a immediate & Coi.
 necessary interest, generally speaking in the cause, either
 from having a certain benefit or loss, or from being liable
 to costs. To this rule however there are certain excep-
 tions. Gilb. 116 - Phil 37 note 2 10th. 596 - Pea. 149 -

And the rule is so strict that tho' the party to a
 suit is a mere trustee, having no beneficial interest
 whatever in the subject, he cannot be a test. Ref. A
 Receiver or Guardian to an Infant - he is p^{ty} on the
 record & liable to costs in case of defeat & his ultimate in-
 demnification for those costs is contingent - so that he is
 interested in the event, tho' he has no beneficial inter-
 est in the subject matter. 3 East 7 - Pea. cas. 153 - 7th. 668.
 2 Day 404 - Phil. 37 note b.

And an Exr., whether p^{ty} or de^{ty}, in a suit can-
 not regularly testify on his own side of the question, tho'
 he has no interest whatever in the subject matter & even
 tho' he is not liable when p^{ty} to costs. Make the rule to be
 positive, that the presumption of interest in the party
 to the record cannot be rebutted - Suppose then an
Exr. suing on a Bond offers himself, to testify as a test. to
 prove the ex^{on.} of it, he will not be admitted, but must
 prove his handwriting as if he were dead. 10th. 289 - 2
 Ver. 42 - 2 Ver. 269 - Str. 24 - 2 East 103.

But the Members of Corporations having no indi-
 vidual interest in the suit are admissible & testify in favour
 of the Corporation - for the Corporation is a legal entity,
 distinct from himself & whose interests are independent of
 those which he may have in his individual capacity.
 And he would not be liable on failure for costs individu-
 ally. Thus the Officers of a charitable corporation, who
 have no beneficial interest in the fund, but merely hold for oth-
 ers are admissible wit. for their testimony, for the fund of Cor^y are liable ^{for} costs.

But where the Corporators are personally interested they cannot testify. E.g. Stockholders of a Banking Institution. Corporators of a Toll bridge Co. Here they are personally interested, tho' they are individually parties. 1 Ven. 357. Bull. 92. Skin. 176. 5 M. 174.

It was formerly tho't indeed that where the interest of any Corporator was very minute, that circumstance would remove the objection to his competency. 2 Sess. 231. 1 Ven. 357. Pea. 161ⁿ. But this rule is too vague for practice & is now exploded - so that the slightest degree of individual interest excludes a Corporator. Bull. 290. 5 M. 174. 11 John. 57.

But in this case the competency of a Corporator may be restored by disavowal of his consent, whether he has lost his Corporate franchise by disuse or abuse, or whether he has resigned it, for in both these cases he has lost his interest. 6 M. 165. 1 M. 595. 11 Mod. 202. Sa. 432. Com. D. Franchise Tr. 30. Phil. 92. Pea. 164.

The second branch of the genl. rule above is, that one deft. can no more testify for his Co. deft. than he can for himself. - But in an Action sounding in Tort, if no evi. whatever is given agt. one of the defts. he is entitled at the close of the plf's evi. to a discharge or motion & may then testify for the other; Yet if there is any evi. whatever agt. him, however feeble, or circumstantial he cannot be discharged, but the whole case must go to the Jury. 1 Sid. 237. Gilb. 117. Bull. 205. 1 M. 264. 3 M. 282. 3 Esp. 15. Pea. 152.

And if a writ. for the plf. is by mistake made a deft. the Court will on motion suffer his name to be struck out & then he may be examined for plf. And in case of a Public prosecution as an information, the Atty. Genl. may enter a *Vol. prosequi* as to him & then examine him, for in both cases he ceases to be a party & therefore is not within the genl. rule. 1 Sid. 441. Bull. 205. Hardw. 103. Phil. 63.

And on a Judgment agst. two as S & B, B, having
subscribed his fine is competent to testify as to the other
deft. for he has satisfied the Jdgt. & is no longer a party. Ceci.

But on the other hand B by suffering a default
does not restore his competency. The case is still in not
yet ended & therefore falls under the rule that one deft. can
not testify for another. Co. deft. Stra 638 - Bull 205 - 5 Rep 155.
Hamm. p. 333 - 10 Johns. 95 - Phil. 62.

And if one of two defts. on a joint contract has
obtained his discharge under the Bankrupt law, he is still in-
competent to testify as to the other, for he is a party to the record
& must still take his trial & at any rate the fact of his hav-
ing a discharge does not put an end to the suit. 2 Rep. 251
Phillips 62 note.

So also if in an action upon a joint contract agst.
two, one suffer judgment by default, he is still incompetent to
testify for the other, for if the action fail as to the other deft.,
the Jdgt. will not be able to use the Jdgt. by default agst. him
& therefore were he allowed to give ev. agst. him to defeat the
action, it would be giving ev. for himself. The decn. is agst.
both & if it fail in part it must in toto. Phil. 62 - 4 Taunton 752.

And a party jointly liable with deft. in a suit
is liable solely in his stead, tho' not himself a party, is yet an incom-
petent wit. to defeat the suit. Bly. if one partner alone is sued
the other cannot prove that he himself alone is liable:
for if a recovery is had, the wit. would be liable for one half
of the costs. This is an interest in the event Pea. 155-170 -
Pea. Cas. 174.

A release discharging the other partner, by the deft.
from all liability for costs would restore his competency.
Rep. R. 103 - vid. "better law".

In Chancery where one of several defts. has an
interest in the suit, he may be examined on either side.

Here the rule in equity differs from that of C. L. 3d Ed. 401. Sub. 393 - Phil. 63.

A Bankrupt is not competent in an action by his Assignees to prove property in himself or a debt due him-
self - for the assignees stand merely in his own place -
besides it would be suffering him to give evi. tending
to increase his funds, & augment his allowance un-
der the Bankrupt laws. Bull. 43 - Phil 51-9d Pra. 167-

The same rule holds as to the credit of a Bankrupt
he cannot testify, for to increase the fund would in-
crease the dividend, besides he has the beneficial inter-
est in it & not the assignees. He is like a Cestuy que Trust
Stra 507-650-2 Dallas 40-1 Mr. R. 239-2 Day. 466-5 John.
256-427- For other distinctions relative to Bankrupts pe-
titioning creditors, vid Pra. 167-Phil. 51-2.

A Bankrupt is not a competent wit. to prove any
fact necessary to establish the commission, because he is
interested in the support of it as the means of discharging
him from his debts.

Nor can he be permitted to prove anything in
support of the commission, even after obtaining a certifi-
cate, tho he should execute a release of his share to the
surplus, for if the commission is not good, the certificate
& all subsequent proceedings are void & the Bankrupt
would be liable for all the debts, from which the certificate
would discharge him. Hence to permit him to give evi.
to support the commission, would be to suffer him to tes-
tify in his own favour. Stra. 229-2 Mr. R. 279-5 Rep. 22-
Pra 160 - Cowp. 70 - Phil 51.

But he is competent to explain any equivocal act
done by himself, & thus disprove the commission, or in oth-
er words, to prove that he has not committed the act of
Bankruptcy. Here he has no interest for without the commis-
sion, he is still liable for his debts. Ed. Denying himself

This credit, i.e. keeping within doors privately, so as not to be seen by them, as by Stat. 13. Eliz. c. 7. an act of bankruptcy, & explain this equivocal act, he can prove that he was detained by sickness. This explanation is admitted & destroys the commission, but not the debt. Pea 168-220/207

Also he is a competent wit. & diminish the estate claimed by the assignee, as his. Ely. In action by assignees to recover a debt of the bankrupt, he may testify to disprove the debt, for this is testifying agt. his own interest. Cowp. 70 - Pea 168.

Formerly I observed that the admissibility of the Record as evi. for or agt. a wit. in a future suit is the criterion by which we determine generally what is interest in the E. Deut. But tho. this criterion is generally good it is not universal, for there are a few cases of interest in the event, altho. the Record would not afterwards be evi. for or agt. the wit.; but these should rather be called except cases & so very rare are they that Lord Kenyon, who established the general criterion & some of the best modern Judges have pronounced the Rule Universal. Swift observes, that there is scarcely a rule of evi. to which is not an exception. Phil. 49-50 Gilb 106-7 Bull 284-4 Th. 19.

Ely. In Trespass agt. A. who is a Shp. by B. for taking his goods on loan agt. C. C. the loan debtor is not a competent to prove the property in the goods in himself. Here it is clear that the verdict, could not be in for or agt. C. It is res inter alios acta. Yet C is interested in the event. The benefit derivable to himself, in case the Shp. should prevail is certain direct & immediate, which is the criterion of Ch. B. Gilbert 211. Justin Buller. 2 N. B. 33. or 331 Phil. 47 note 52 -

So also in Eject. between A & B. where C. was called on by B. the deft. to prove himself the Tent in poss. & B. his Bailiff. The Court held that C. was incompetent to prove himself the

real-estate, for tho' the Record here could never be admitted
to show that C. had or had not title, yet he has a direct in-
terest inasmuch as if A recovered C. would be entitled to
a lrt. of real. prop. possession & Taction 103 - 1 John.
cas 295 - 12 Jo. 246 - Phil. 40 note 850 - 12 - 3.

It is also stated by Mr. Phillips tho' he has given no
authority for it, that a devisee who takes an interest
under a Will is not competent to speak of the Testator's
sanity in an action of eject. by another devisee agt.
the Heir at Law. Phil. 51 - 374 - 7. Now I apprehend this
case does not come within the rule, for one tract of the
land may be determined to belong to one devisee, that that
Record cannot be evi. to prove that another tract
belongs to another devisee, nor can the offered wit. be
said to have any interest in the event whatever. How
far the Stat. of Frauds & Perjuries might bear on his tes-
timony I am not here to consider. Phil 51 - 374 - 5-6-7.
For one or two remaining cases of interest in the event,
where the record could not be used as evi. vid. Phil. 50 + 23.

Tho. a lrt. offered is interested in the success of the suit
yet if that interest is balanced so that he must gain or lose
alike by the termination of the suit in favour of either party
he is competent to testify for either. Gilb. 179 - Pra 154 -
Phillips 53.

Thus an an Indictmt. agt. a County for not repair-
ing a Bridge or Road, the inhabitants are competent to tes-
tify on either side, they being as much interested to have
good roads as they are in the expense of them. No auth.
11 Ven. 357 - 6. Mod 307 - & the law will not here notice
the slight preponderance of interest.

On the same principle the acceptor of a Bill of Ex-
change is competent in an action agt. the drawer to prove
that he has no effects of the drawer's in his hands, & thus dis-

power with notice of the drawer, if the action by the indorser fails, when brought against the drawer - then the acceptor will be liable to him, & if he succeeds he will (acceptor) be liable to account with the drawer. So his liability is the same in either event. 1 Dep. Cas. 332 - 2 East 450 - Phil. 55.

When the law has a remedy against either of the parties to an action the difficulty of enforcing which would be a failure in the action on the part of the debtor, that circumstance shall not render him incompetent; it was formerly deemed sufficient to exclude him, but the old rule has been exploded. Phil. 55. 6 - 3 R. 579 - 2 Day 399 - (Note all these authorities are in support of the old rule except Phillips who cites no case to support *ideo quere*.) the claim of the party is here accruing in either event & to exclude his testimony on the ground of interest would be speculating & vaguely

So also in Assumpsit for money paid for the use of shipowners, the Captain of the ship is competent to prove that he paid the money for the use of the owners or debt. his liability is the same in either event for if he has not paid the money over to his employers he must be liable for it & come one let the case go as it will - And on the contrary if he has actually paid it over he cannot be liable to either. 7 T. 404 note c - 1 Campb. 407. 2 Cairnes 77. Pea. 165 - For analogous cases, vid 2 Roll 685 - 3 R. 300 - 13 East 175.

So also in Assumpsit against A & B. I. S. who had received the money from debt for self. was held competent to prove the fact, that he had received it as Agent for self. his liability being the same in either event 7 T. 400 - Pea. 165.

If however the law would be liable in one event to a greater extent than in the other he is not competent to testify in favour of this balance of interest, i.e. on that side on which his interest preponderates, yet he may testify for the other party against that interest. 4 T. 64.

There are certain exempt cases in which a Party to a suit is permitted to testify in his own favour. There are exceptions to the rule at C.S., & are very rare.

Thus in an action by Stat. of Winchester 13. Ed. 1 alias Winton, alias Stat. of Hue & Cry, hot. agst. the Hundred the party robbed or self. is competent to prove the fact of robbery & the amount of loss, unless proof satisfactory is otherwise made out. This is from necessity. 2 Roll 685-6- Bull. 197- Phil. 57- Pea. 150-

This is a species of evi. which must be admitted otherwise - as robberies are genly committed in unfrequented places, the action would be defeated 99 times out of a 100.

As to other facts which in common presumption are provable by other evi. the party robbed is not competent to testify. Ely. He cannot prove that the place where the robbery was committed was within the Hundred, &c. tho' he may state the place without reference to the hundred Hardw. Cas. 83- Phil. 50- Pea. 150- Bull 197-

So also in an action for a Malicious Prosecution, the evi. given by Jdgt. on the Original Criminal Prosecution may be proved in his own defence by others who heard his testimony. - Malicious Prosecution is an action complicated from the manner in which it arises & the nature of the parties & this rule is founded on a necessity arising from the peculiar circumstances of the action, without it rogues would seldom be bro't to justice - for prosecutors would be deterred from performing their duty. 6 Mod 216. Bull. 14. Phil 50-9- Pea. 151-note.

This & the preceding appear to be the only cases in which a party is allowed to testify for himself by C.S. i.e. in his own favour.

But a party is allowed sometimes by Stat. to testify for himself. The English Stat. on this subject are local & have no influence here. But in the U. States (comb) there are similar provisions. I will refer to two or three cases under the Ch. Stat.

By Ch. Stat. both parties can testify in an action on Book-debt. So in an action & in an action by receivers of Counterfeit money & forged Bank Bills. So also in an action for a secret Assault. So plf. in an action on the Stat. of Bastardy & in "Qui Tanti" prosecutions for theft may testify to the loss & identity of his property but nothing further. So Def. in Ct. may testify in a Sci. fac. on a Judgment for himself. So also in case of Trespass in the "night season" the party accused may testify for the purpose of giving a satisfactory account of himself. St. Ch. 99-101-94-546-660-2 Day 116- Evi. 81-108.

Upon a similar principle of necessity for the sake of trade & custom & by usage of business &c. &c. Agents or servants, becoming interested in the course of their employment, are competent wit. for their principals or masters. Pea 151-64-7-71-Phil. 94-5- Col. - A factor may prove a sale of goods for his principal & charge the vendee with the price of them, tho' he himself is entitled to a commission out of the proceeds. So far as his relation could create a bias in favour of his principal, his credit with the jury may be diminished however 3 Wils 40-1 Atk. 240-2 Atk. 590-Bull 289-Pea. 165-

And in good any one who contracts with another for another by proper authority is an agent with ⁱⁿ the rule. 2 Atk. 591-Phil. 94-3 Wils. 90- So also an Agent is competent to prove in favour of his principal a payment of money on a delivery of goods to a third person, & yet this is Evi. for himself- for if he has paid the money &c. over in person by he is liable to his principal, This is also an objection to

his credit. Pea. Cas. 129. Bull. 229- 4 N. 589 90- 3 R. 40- Stra 647.

So where an agent has paid money by mistake or overpaid, he is competent to prove the fact in an action by his principal to recover it back. *Ex. Clerk in a Store* Stra 647- 3 Campb. 144-

But the rule is otherwise as to acts of servants not done in the regular course of their business & which are claimed to be violations of their trusts or duty. *Ex. Action brot. to recover money paid illegally as in gambling or which he has fraudulently squandered away, he is not a competent wit.* unless his master releases him from liability. Pea. 164ⁿ. Corp. 199-

So also in an action brot. agt. a Master for an injury done by the negligence of his servant - the latter is not a competent wit. unless the master releases him - it was not an act done in the discharge of his duty. Stra 650- DeRay. 1411- The 1003- 4 N. 589- 1 Corp. Cas. 339- 1 Campb. 251 & et. vid. post 507.

So also in an action on a Policy of Insurance for the Barratry of the Master or Captain, ^{he is} not competent to testify for deft. or Underwriters without a release, because if they are subjected he will be liable over to them. He is therefore directly interested to exonerate the Underwriter & Corp. Cas. 339 Pea. 166- vid. rule.

And an Agent when competent to testify at all is competent to prove his own authority, but if his authority has been conferred by a written instrument, he cannot regularly testify to prove it without producing the written instrument 2 Dallas. 246- 300. Phil. 96- 1 Corp. Cas. 406- 1 N. 403-

It was once held that if a wit. supposed himself under an honorary obligation, this was not a legal one to indemnify one of the parties to a suit. he was incompetent to testify in favour of that party. Stra 129- 1 N. 403- 1 Campb. 145- 2 John 219-

8 John. 420 - 5 Mr. R. 510 - 1 Dall. 62 - 2 H. 50.

Evi.

This obligation is so uncertain & variable, that courts of Justice cannot recognize it as a motive of conduct. And if a witness' sense of honor be so strong as to oblige him to speak only the truth in evi. - or if a sense of honor be not strong to bind him, then he is no longer interested. Undoubtedly however the influence created by such an honorary obligation, would go to his credibility & not to his competency.

To pursue the subject of interest in the Event. It is said this interest (to exclude testimony) must have existed at the time of the fact in question, & have arisen afterwards by operation of law, or the act of the party who claims the benefit of the testimony. See 157 St. Phil. 100 - I will first explain the Rule & then point out its defects.

According to this Rule an Interest by a witness' own act without the concurrence of the party who produces him, does not disqualify him - because, otherwise, by any ~~voluntary~~ or unnecessary act of his own he could at any time make himself incompetent & deprive a party of his right who was justly entitled to his testimony. If a man to a Bond or other contract makes a Bet with another person, that the ^{one} claiming, will prevail in his action, he is still competent to testify & is compellable to testify for the objection to him must be Interest & the ~~materiality~~ ^{materiality} of the Bet & not the ~~one~~ ^{one} he no difference, if the objection had any weight whatever. Then were it not for this rule he might deprive the party of his testimony at any time by wagering six cents on the event of the suit. Bull 290 - Phil. 100 - Skinner 586 -

Another example. If a prosecutor or other person previous to conviction of a third person lay a wager that the latter will be convicted of a crime, he is still a competent wit. on the trial of it, & for the same reason St. auth. 21 McAl 145 - Stra 652 - 3 Eco. 152 - In these cases it

It will be observed, that the Interest did not arise by operation of law, nor by the act of the party claiming the testimony. And it has been determined by Lord Kenyon - Just. Ashurst, Buller & Grose, that where a Policy Broker had procured B. to underwrite a Policy & then underwrote it himself - B. could not be thus deprived of his testimony. Kenyon & Ashurst lay down the principle that an interest acquired by the witness own act - after the time of the fact in question, is not sufficient to exclude him. I would remark by the way that who does not consider the Policy Broker interested in the case, this is the ground on which the argument of Lord Kenyon & Ashurst proceeded. Therefore (comb.) he might have been admitted without the assistance of such an argument. Quere. 3 M. 27 - Phil 100.

This latter opinion which constitutes one ground on Lord Kenyon's side, I think is carrying the rule too far; for I apprehend that the rule extends only to those cases in which the act creating the interest is either fraudulent, i.e. meant to deprive a party of his right to testimony, or merely gratuitous, i.e. wanton & idle - &ly. Case of the Bet & Malicious prosecution *supra*. But the act of underwriting which created the interest of the Policy Broker was honest & even laudable - neither fraudulent nor wanton, & in 3 Campb. 300 - Phil. 100 - 9 - it is decided that an interest honestly acquired renders a wit. incompetent. For where one underwriter was sued on the policy, another paid over his subscription to the plaintiff *pendente lite*, having obtained a promise from plaintiff to refund it, in case his action against the other underwriters failed, & here the wit. offered had honestly become interested, for he did become so to avoid a lawsuit; the court held him incompetent & thereby actually denied the principle above stated. -

On the other hand a third person cannot by voluntarily acquiring an opposite ^{interest} privilege himself from testifying. Evi. If a subscribing wit. has become bail to the obligor, he is still competent & may be compelled, to testify to the case of the instrument in favor of the obligee. 1 Pea. 105 Phil 101 note. 2 East 466.

Tho' where the Bail of one party becoming bail requires a knowledge of the fact in question, he cannot be compelled to testify, for he was interested at the time of the fact, in question, took place. Id. auth.

But where a subsequent interest in the event is cast upon him by operation of law, he is incompetent to testify in support of that interest. E.g. - If a person is a subscribing wit. to a conveyance made to his ancestor - he cannot testify, after acquiring an interest, to the case of the deed. So also if the Bail of a Bond is appointed an Ad. to obligee he cannot afterwards testify to the case of the instrument, because he becomes interested by operation of law & not by any fraudulent or fraudulent act of his own. 1 Pitt. 289 - 2 Term. 699 - Stra. 34. 5 W. 372. 2 East 183 - 3 H. 7.

So where an interest in the event accrues by the act or concurrence of the party, offering the wit. - the latter may testify for the opposite party, tho' not for him for whom that interest was created. E.g. If a subscribing wit. marries obligor - he or she cannot testify for obligor, tho' she may to the case of the instrument, in favor of obligee. 2 East 183 - 2 A. B. John. cas 237 - Pea 157-85

I have observed that as a Genl. Rule the interest to exclude as a wit. must have existed at the time the fact in question took place. I now observe, that it must continue till the time of the trial.

Hence the removal of Interest of wit. before trial reg-
ularly restores his competency. *Elg. A writ at C. & he attest.*
by a Legatee & he releases his Legacy before the time
of trial, his competency is restored. *1 Burr 423-7- & answered.*
which is the leading case of *Windham v Chesterfield*, this
that is considered with frequent reference to the Stat. of Frauds
Doug 139- The 1252-8 Vin. ab. Tit. xiv. 14 note 10- Pea 158-
11 C. 8. s. 73- 1 Phil. 22- 270- 1 John. 377-

There has it is true been a diversity of opinion on this
question as affected by the Stat. of Frauds. *C. L. J. Doe (Stra.*
1253) D. Hamden v. Hindon & Roney formerly held that on
construction of the Stat. of Frauds &c. if an attesting wit.
& a writ is devised & before trial releases his interest he
is incompetent. But latter decisions hold him competent -
Phil. 97n (Pow. D. 124 to 134- 1 Ct. R. 418 n. 1).

And now by 25. Stat. Geo. 2. the Legacy or Devise
to a subscribing wit., as in the case last stated, is void & there-
fore as the wit. is not interested he is competent to prove
the Will as to the residue, or other dispositions therein.
This St. is declaratory. *(Pow. D. 120-3- Pea. 160- note.)*

This Stat. makes the same provision where the lega-
tee has been paid their Legacy's before trial or have releas-
ed their interest or refused to receive payment or tender before
trial. *(Pow. D. 122-3-33-4.)*

It follows from the last General Rule which requires
a continuance of interest till time of trial, that a release to
or from an interested wit. or any other means by which he
is divested of his interest at the time of trial will restore his
competency. *Doug 139- Phil. 97- 1- Pea 158- Elg. On the trial*
of Dr. Dodd for forgery a release from the holder of a prom-
issory note to Dr. Chesterfield the supposed drawer in whose
name it was forged made him a competent wit. to prove
the forgery of the said writing. The rule excluding the tes-

timony in this case without a release is perfectly anal-
agous, as the interest of the Deceased is only in question.
ante. Greenh. C.C. 170-84-255- Pea. 169-2-11- Phil. 98-

So also if the party in whose name the instrument
is forged has, before trial on the indictment set aside the
forged instrument by Judge of law, he is competent to
prove the fact, for then that interest in the question (which
here disqualifies) is defeated. Bull 209- Pea. 169- And for anal-
agous cases 1 M. R. 75- Phil 97-

So if a Servant for whose neglect the Master has
been sued, is released by his Master he is competent. Pea.
cas. 53- Stra 103- Pea. civ. 166- and ante 502.

So if a ^{and} Certificated Bankrupt who has released
his claims to the allowance, is a competent wit. to prove prop-
erty his own, i.e. to increase the fund. Bull 43- 2 M. 497-
Phil. 51- 98- and ante

And where a release or payment to or by a wit. would
if accepted by him restore him to competency, a tender on
one side tho' there be a refusal on the other will have the
same effect. & by. Ex. tender payment to a legatee or devisee before
trial who refuses to accept. he is restored to competency &
may be compelled to testify by Q. Ex., that the will to which
his name was subscribed as a wit. was duly executed-
Pea 150-9- Saug. 139- 3 M. 35- 1 Burr 417-

And this Rule extends to all the analogous cases
supra- as if a Servant for whose neglect the Master is sued
is offered a release & refuses. So also if a release is tender-
ed to a Bondsman &c. for they retain their interest by their
obstinacy-

But if a person gives a deposition while interest
in the Cause & that interest is afterwards removed his dep-
osition is inadmissible & he may be compelled to testify.
Crim. R. 14- Phil 97-2- & by. Daffs Bull gives a dep. before trial af-
terwards he is restored by substitution- The Dep. is inadmissible.-

A person is always competent to testify against his own interest, tho' not in legal compellable to do so. See 644 Reg. 1008. Sta 406. Danc. 572. 7 L.R. 172. - I have now closed my observations on Interest as affecting the competency of Witnesses.

But persons are sometimes incompetent by reason of the Relation in which they stand to one of the parties independent of the cons. of Interest. Thus Husband & Wife generally cannot testify for or agt. each other; clearly Interest is not the foundation of the Rule, for if it were they might testify agt. each other. It is founded on the Domestic Relation of Husband & Wife. - 1 M & B. Bull 200 - 1 Bl. 443 - 4 T. R. 670 - Vid. Lit. "Baron & Feme" post

Counsellors, Solicitors & Attorneys are neither compellable nor permitted to swear to any Confidential-communications by their client in relation to any suit pending- here too the ground is the relation between Counsellor & Client. Bull. 204-4 F. 432-753- Van 197-16 Mod. 40- Pca. 176-7- Nor are any of them compellable to produce in one cause a paper committed to them by a Client in another F. Ms. B. 370- 2 Bay. 499.

The rule is the same if the Suit is at an end or the Attorney or Counsellor is dismissed. If then he has been employed in another cause he cannot testify in the latter as to communications made to him in the former, unless his client will dispense with his right of secrecy. 4 M. 759-60-2
Cam. Feb. 570-1891 695-

Not can he testify to facts thus disclosed upon a trial of a subsequent suit between third persons. These rules are not founded on any privilege of the Attorney, but on the right of the Client. 12 C. P. 695 - 4 T. B. 759. -

The same rule holds then as to Interpreters between a party & his Counsel - he is a mere organ. *Pea. cas. 77-D-4* *Mc. 756*. *Pea. cas. 170* - *Phil. 103*.

But this privilege of the Client is confined to communications, respecting professional business & made during the relation of Counsellor & Client. Hence if an Attorney be not retained & if he do not come strictly within the rule, he is a competent wit - he is but the repository of individual confidence, which is not regarded by the Law. *Mc. 756* - *1 Quince's R. 157* - *4 Mc. 753* - *Pea. 169*.

And if the Client waive his privilege, the Attorney is admissible & compellable to testify for the opposite party; for the Attorney has no privilege of his own. *Phil. 103*.

This rule which confines the privilege strictly between Attorney & Client has been carried so far, that a party, who has been consulted by mistake, on the supposition of his being an Attorney at Law, has been compelled to testify to the communications that were made to him. This is carrying the Rule to an extraordinary length. *Phil. 103* - *5 Esp. 113*.

And where an Attorney communicated with the adverse party by the direction of his Client it was decided that testimony in regard to what passed might be procured from third persons who overheard them, tho. not from the Attorney. *3 Camp. 10*. (Here Mr. Gould thinks that a Clerk or Student in a Law Office could be compelled to testify in regard to communications from Client to Attorney in his hearing. - *vi*. *Phil. 103*. *vi*.)

The Rule extends only to the three cases of Counsellor, Solicitor & Attorney - So that Physicians & Surgeons are made to disclose, every confession made to them confidentially in the line of their profession. *4 Mc. 759* - *Pea. cas. 77* - *Pea. cas. 80* - and where a confession has been made to a Roman Catholic Priest, according to the practice of the Roman Church

he may be compelled to testify to the facts communicated to him. Pea. 100 - Pea. cas. 77 - Phil 105 note. Persons have thus often been convicted & executed 10 Mch. 253.

A fortiori a mere private confidential friend to whom communications have been made disclosing circumstances respecting one's case is competent to testify in regard to them & this, even tho. they were made under the most solemn injunctions of secrecy. Pea. cas. 77 - Phil 104. Pea. cr. 100.

It has been determined that a Clerk of the Revenue Commissioners who had taken an oath of office not to disclose the secrets. He should burn in that capacity, should be compelled to disclose them in evi. on the ground, that to such an oath, the case of giving evi. in a case of Justice was an implied exception, or at all events, if there were no such implied exception, then the oath was voluntary & extrajudicial. 2 Lamph. 337 - Phil. 104.

An Attorney may be examined agt. his Client as to facts known to him before he was retained. Otherwise the party might at any time deprive the other of the benefit of an Attorney's knowledge of the facts in question, merely by retaining him. 1 Ven. 197 - 1 Ves. 62 - 2 Hb. 105 - 4 Mh. 759 - Bull 204 -

So where an Attorney or Counsellor has attested an instrument to which his Client is a party, he may be examined as to the contents of the instrument agt. his Client, even tho. it was attested after he was retained, for here is no communication in "professional confidence" - it was made to a wit. & as such he must perform his office. Casp. 845 - Pea. cas. 100. 4 Cr. 235 - 5 Hb. 52 - Phil. 105.

So also an answer in Chancery when produced in evi. agt. a party, his Attorney or Counsel who was present at the time may be called to swear that he did make oath to such an answer - here again there is no confidential

communication & him in his professional capacity. It was a public act. Cowp. 846 - Bull 284 - Phil. 105 - Plak. 170 (contra Stra 1122.)

And generally as to any collateral fact which the att.orney knew or might have known without being introduced as an attorney in the cause (Phil 105) he is competent to testify agt. his client. Ely. Measure in a deed. An attorney may be examined as to the question, whether he ever saw such a deed or will in a deft. plight, for that is a fact of the attorney's own knowledge. Ely. D. 717 - Bull 204 - 14th 1797.

So also an attorney may be called to testify in favour of the adverse party as to the contents of a notice recd. by him. 7th 1807 - 357 - So in Debt on Bond, the plff's attorney has been admitted to prove from his own previous knowledge that the Bond was erroneous & other plff. by retaining a person conversant with that fact as Counsellor might deprive deft. of his testimony. Pen. cas. 100.

And where a client after his cause is ended communicates facts which occurred, the latter is competent to prove the facts & may be compelled to disclose them. 11 T. B. 432 - Pen 179 -

An attorney may be called on to testify that one of his clients tort. swore in a deft. manner on a former occasion indeed he may be compelled. Pen 179. 9 - 11 State Trials 253 - It was not communicated confidentially but publicly.

It was once resolved that a person who has put his name to an instrument to give it sanction is not admissible to invalidate it. Such was the decision on the important case of Hutton vs. Sheller, which went on the ground that as hert. had given it credit with the world by his own name, he is precluded by a species of estoppel. 1 M. 296 - Pen. 101.

Some after, this same rule was recognized in a more limited extent, i.e. it was held applicable to negotiable instrument only. Ely. In an action by indorsee of a Bill of Exchange agt. Acceptor the Indorsee was held incompetent to prove it erroneous. 3 M. 34. Pen. cas. 6. 46. 52 - Phil 24. 1 Ely. 290.

In a still later case however - the case of *Jordan & Gashbrook*, this latter rule was denied & it was determined that no such rule holds even as to negotiable Instruments 7 T.R. 604 - Pea. cas. 117 - 1 Asp. 746 - vid. *Bills of Exchange* &c.

In the courts of the several States, this question has been decided as many ways as there are sides to it & perhaps more - some adopting *Jordan & Gashbrook* - some *Hutton & Shelly*, & some a little of both. 2 Dallas 194 - 1 Bay 17 - 301 - 1aines 258-67 - 2 Johns 165 - 3. Ves. R. 27-565 - 11 B. 156 - 516 - 6 B. 1449 - 7 B. 199-64. R. 260 - where the subject is ably discussed by Judge Swight.

The question, then, is open for discussion both on authority & principle.

It is granted in all these cases the indorsee (or party disinterested) would be admitted to testify to subsequent collateral facts, tho' it is contended, that he cannot prove the instrument originally void - The difference is said to be owing to this, that he would not have signed if he had have known of any illegality in the original stages of the instrument - but heed not have been induced to sign by subsequent act &c. Pea. cas. 6-52 - 3 Ves. R. 27-4 B. 470 - Chitty Bill 204 - 11 Johns. 120 - In Ch. the rule & ground taken in the case of *Jordan & Gashbrook* has been adopted and this I must confess I take to be the better ground on principle vid. *Bills of Ex. & Notes*

How to take advantage of Incompetency.

There are three ways viz. Ist On the "voir dire" IInd By proving his Interest by other wit^s. IIIrd On his own examination when sworn in Chief. Phil 56 9 P. Pea. 106 - 1 T.R. 719 - 10 Mod 193.

Formerly advantage could be taken only in the two first modes - But now he may be examined & rejected if his incompetency be discovered at any time (time) during the Trial 1.

1 D.R. 719-188p. 37 Phil. 204-5-6 John 523-. The Rule is the same De vi.
in Chancery. 2 Vera. 463.

On the "Voire Dire" no questions are proper except such as go to the competency of the wit. Questions going to the Court as to the credit of the wit, are of course irrelevant. 1 H. St. 147-200.

But on the Voire Dire, he may be interrogated as to papers executed by him (which create an interest in him), without producing the papers. This is contrary to the Rule of ev. in gen. on this subject. But the rule differs on the Voire Dire & the reason is that the party objecting is supposed to be unprepared to show his incompetency. Pea. 107.

An objection arising from the answer of a wit on the "Voire Dire" may always be removed by his other answers under the same oath. E.g. If he say he has consented to indemnify Plf. Plf. may ask him if he has not given him a release. Phil. 96- And as he may testify to a written instrument not produced to show an interest in himself, he may in the same way show that his interest is removed. 188p. 162-4. Pea. Cas. 218- (Phil 97. Pea. 107.

But if the interest of the wit is proved by other wits, he cannot remove the objection by testifying to a written instrument, without producing it. The reason is that in the former case the party objecting to him makes him his own wit. To prove his incompetency & therefore cannot object to his ev. - But here he calls on others. Pea. 107.

If a release be given to a wit for the purpose of restoring him to competency it must regularly be produced. Pea. 107.

The decous. of a wit before trial that he is interested in the event is not ev. to prove him so. Otherwise a liar might at any time deprive a man of his testimony. This distinction is often overlooked by young practitioners & on this ground wits are often excluded in our lower Courts. 5 H. St. 261- Phil 96.

But proof of such decess by the party offering him is good evi. & a witness even decess, may be admitted to contradict himself. 8 C. 10. 407.

If the party objecting to a wit. examine him at the "voir dire" he cannot afterwards call other wits to prove him incompetent; he has elected his wit. & he cannot impeach him, 1 Dall. 272 - 10 Mod. 193 Poa 106 - 1 C. 10. 219.

The same rule holds where a wit. has been examined as to his "Interest" on the examination in chief - This question has never arisen in England. as I know of. 3 Day 214 - The reason of these rules is that the law allows a man his election of the three modes of objecting to a wit. But he can take only one of them Poa. 106.

But tho' the party objecting cannot call on other witnesses to prove a wit. incompetent after examining him in relation to it; yet he may call on other wits to prove him unworthy of credit & to show his Interest for that purpose. Poa. 106.

Manner of Compelling the attendance of Wits

The ordinary mode of compelling the attendance of witnesses is by process of sub-paena ad testificandum. Phil. 2. Poa. 191. 3 Bl. 369.*

And if a wit. is in possession of any deed or document he may be compelled by a special clause called a "deceatorem" & produce it on trial in court, which is then called a "sub-paena duces tecum" Phil. 12 - Poa 99. 200. Under which the wit. is bound unconditionally to bring the writing into court. Still, ^{if together} the party subpoenaing is entitled to show it ready in evi. is a question which may be afterwards discussed. 9 East 485. Phil 12.

* A sub-paena is not necessary if wit. will appear without one & if he voluntarily attends & is examined his expenses are allowable same as if summoned Phil. 2. (a)

And a writ is never compellable & shows any riding *Loc. cit.*
 which will expose his own title, or which will subject him
 to any claim, contra as to the last branch of that rule Phil. 386
 Moreausens from analogy & parol ex - sed Quere, for the Stat.
 46. Geo. 3. extends to parol evi. only - before that Stat. the
 question so far as related to written evi. was unsettled - and
 Quere, whether the Stat. is here adopted? 1 Esp 405 - 4 Ib. 43.
 Pea. 97 - 191 - Aff'd 389.

As to Mode of serving a Subpoena. vide Phil.
 4. Pea 192 - Cro. Charles 392 - In Ct. it is served by read-
 ing or producing a certificated Copy. & both in England & Ct. it
 must be done within a reasonable time, which in every
 case is to be ascertained by its peculiar circumstances. Stra 516.
 Pea 192.

In England the subpoena always issues from the
 Court before which the writ is to appear & this (seem) is gen-
 erally the rule in the U. States. In Ct. a Common Jus-
 tice of the Peace may issue a subpoena, returnable be-
 fore the Sup. Courts. Stat. Ch. 64. Deems at Ct.

A writ. tho. subpoenaed is not bound to appear in
 Civil cases, unless a reasonable sum of money to defray his
 expenses in going to, remaining at, & returning from the place
 of trial, be tendered him. This is a condition implied in the
 Subpoena. Stra 1150 - Phil. 4. Pea. 192 3. St. 399. Pick be a married
 woman the tender of expenses is made to her husband. Phil. 4.
 And if after service of subpoena & a tender of ex-
 penses, he refuses to attend he is liable to an action on the case
 for damages in favour of the party who summoned him or to an
 attachment for a Contempt of the Court, or to an action on
 the Stat. of Stiz. for the penalty, with a recoupment to the par-
 ty aggrieved which is also recoverable under the Stat. Un-
 der the attachment which is principally used in England, he
 is also fined & compelled to make satisfaction to the party aggrieved -
 Doug. 335 - Phil. 4. Stra 510, 510, 1034 - 1150. Conf 846 - 3 B. & 1329. Com. b. 449. 5 B. 369 n. 13.

The Process in Ct. to enforce the attendance of a Wit. is to issue a Capias, directing the Officer to arrest him & bring him before the Court to testify. A Capias in England is to furnish him, tho' in Ct. we doubtless may also use the Attachment.

At Ct. there is no precise sum to give to a witness. It is in England to be proportionate to the witness' rank in life. In Ct. reasonable costs & charges is required, vid Stat. Ct. 605.

If a prisoner is in such a situation, that he cannot be called to testify - or on board a Ship, whose Officer will not permit him to go on shore & subpoena is ineffectual, then the process to compel his attendance, is a Writ of Habeas corpus ad testificandum. Co. p. 672. Foster 396. 3 Burr 1440.

If however the Wit. is a Prisoner of War, the Writ of Hab. Corp. will not regularly issue to compel his attendance without the consent of the Executive Government. Day 419 - Pea 193. Phil. 10.

The Mode in Criminal Cases will next be considered - 1st By Subpoena - 2^{ndly} By a Recognizance before the Justices or Coroner, who takes the Information. This is affected by requiring the Wit. to enter into a Bond for a given sum to appear & testify, & then if he does not appear he forfeits his recognizance; or if the Wit. refuses to enter into the recognizance, the Officer may commit him for a contempt. 2 Hales P. C. 201 - Phillips 7.

In Criminal Cases also Wit. are bound to appear for the public without any previous tender of expenses. & by the C. L. there is no provision made for reimbursing their expenses - remedied by 27. C. 2 - & 17. C. 3. Similar Stat. in Ct. Phil. D.

The person of a wit. attending to testify in a cause is regularly protected, from arrest the protection holds "unde, mandando et redundo" for a reasonable time. 2 Bl. R. 1113 - Pea 193 - Phillips 6-7.

And it is not necessary to the protection of the wit. (tho there is a vulgar error contra) that there should be any subpoena served upon him. Convenience & the reason which govern in other cases is the same here. 9 Jo. 536 - For a different opinion see 6 H. R. 264 - 2d ed 2 John 538 - 1 Caines 115. Phil. 5.6.

The same protection holds in favour of a witness attending from another State, tho the process is of no authority. 2 John 294 234. The rule is also extended to arbitrators, by order of C. J. D. & (semb.) it should be extended to arbitrators not appointed by Rule of Court - as these. Domestic tribunals are so favourable to Justice &c. Pea. 193 - Phil. 6.

But to oblige a wit. to attend by Subpoena, he must have been served with it, a reasonable time before trial & a reasonable time is allowed him in going to & returning from the place of trial. As to what constitutes a reasonable time, the practice of the Courts is not very strict, depending upon circumstances as Health Distance &c. 2 Bl. R. 1113 - 13 East 16 - n. Phil. 6.

And if a wit. in such case is arrested in violation of his privilege, the Court will on Motion discharge him by Habeas Corpus Pea. 193.

It is usual & convenient for a wit. (tho strictly unnecessary) to obtain a written protection from the Court, convenient for any Officer, without it he might arrest him. Tho unnecessary, for if he were arrested & brot. back on his way home, the Court would discharge him.

When a wit. resides abroad, he may under an Order of the Court, be examined, provisionally "de bene esse" on interrogations before Commissioners. But a Court

of law cannot issue a commission of this sort or kind without the consent of the parties. 2 Lidd 812. Pea. 60 - Phillips 10-372 3.

And if at the time of trial the test. is beyond the reach of process the deposition may be read not if he remains at home or returns at the trial - Hence the Deposition is called *de bene esse*, i.e. taken used provisionally. 10th 691. 1 Cam. 16. 172. 506. 208. 92. Casp. 174. 11300. 211 - Subject explained, Phil. 10. Vid. ante 452.

Depositions are not admissible as a matter of right at C. D. Sess. in Chancery (ante) where the ex parte depositions are often the only ones. Depositions in Courts of law are only taken by consent, tho' in cases of *obstinacy* the Court will put off the trial & give time to the party to procure a commission from equity.

But by Stat. of Ct. where the party whose testimony is desired is bound on a voyage at sea or lives 20 miles from the place of trial or is removing or is confined in prison by process or is aged & infirm his deposition may be read in evi. Stat. Ct. 604-5.

in Ct. Perjury is assignable as well on a deposition thus taken as on testimony *viva voce*. Stat. Ct. 540. - Where is it at Ct. on a Commission issued by a Court of Law? 10th 11. 11300. 211.

If a Dep. is written by the party for whom it was granted, or by his attorney it is inadmissible & so is a copy In Ct. subscribing Wit. & Jur. may be sworn before a Magistrate & then entered on the back of the test. is rec. as evi. 10th 114. 11300. 211.

But Depositions are not admitted under the Ct. Stat. in Criminal Cases. By construction given to the act however they are admitted in *Qui Tunc* prosecutions if no corporal punishment could be inflicted as also on the Stat. of Bastardy. 1 Root 154-307. 11300. 211.

Sewi.

And Depositions taken by Justices of the Peace in other States in the manner prescribed by our Laws are admissible here, even tho' by the law of that State a Justice of the Peace has no authority to take the Deposition. Sewi. 114.

The Ct. Sup. & Co. Courts are empowered to take depositions of parties going abroad - and in vacation any Judge of Sup. Court or of the County may do it. Stat. Ct. 49 - Sewi. 115.

Before a deposition is taken under Ct. law. Notice must be given to the adverse party, or his attorney, provided either of them reside within 20 miles of place of caption - Stat. of the U. States requires notice when within 90 miles Stat. Ct. 604 - 1 Root 316 - 400 - 574.

This notice is to be in writing & is to be left with the party or his agent, or a copy at his place of abode - The same rule holds as to depositions taken out of the State, i.e. if the party or his agent are living more than 20 miles from the place of caption notice is not necessary. Kirtb. 1 - Sewi. 12.

And depts. vaucher is also to be notified in Ejectment or Dissolution. 2 Root 85 for they are entitled to defend.

If several parties are joined in a suit, a deposition can be used only agt. such as have been notified. - when notice is necessary. Kirtb. 100.

Every Deposition under the C.S. is to be addressed to the Court, i.e. by way of superscription & unless it is delivered by the magistrate himself it is to be sealed by him & he must certify to his Seal. Stat. Ct. 604. And as to the conclusiveness of the certificate, vid Sewi. 114.

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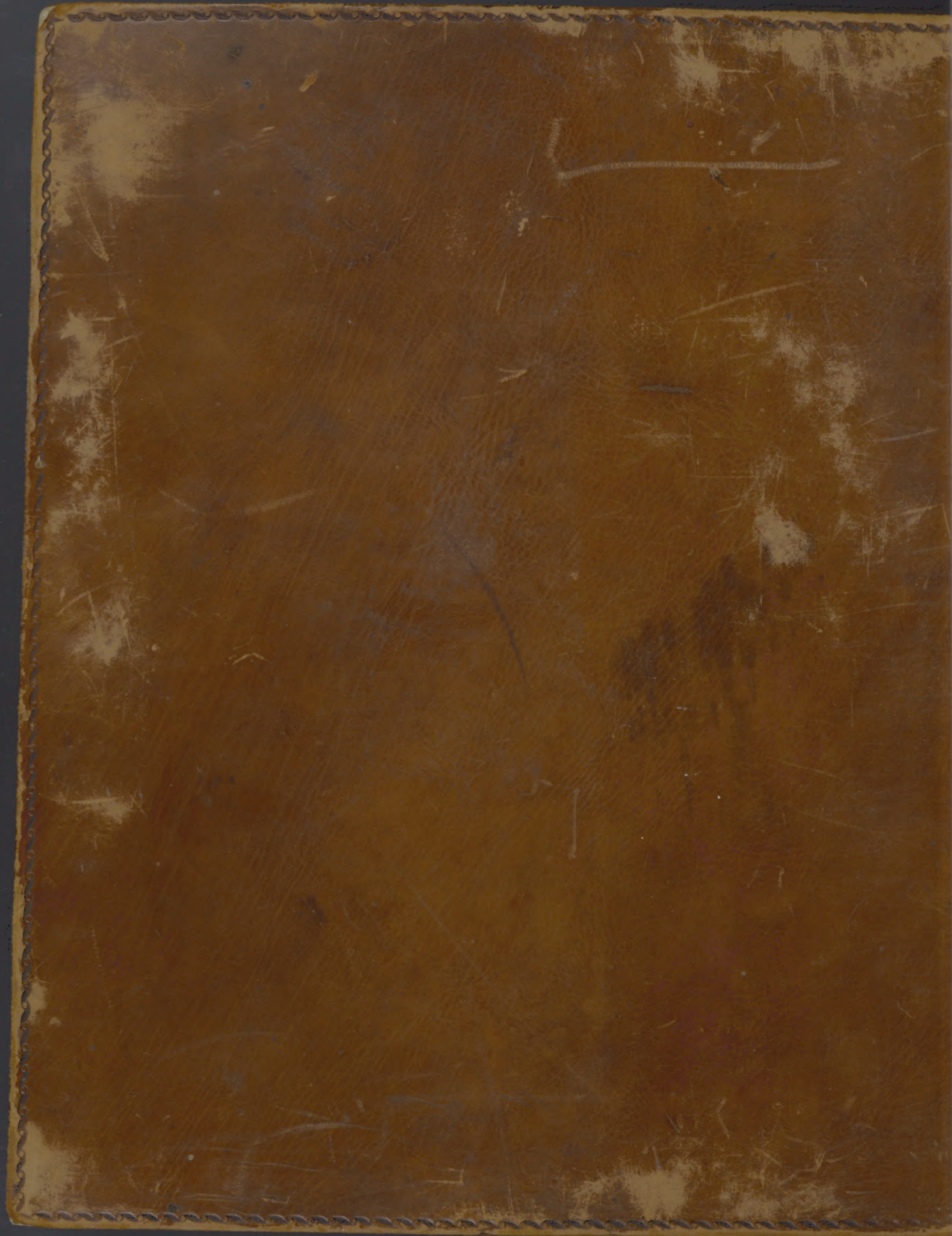
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